CLERK'S COPY.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

No. 183

FORD MOTOR COMPANY, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

OCTOBER TERM, 1937

No. 7919

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

FORD MOTOR COMPANY, Respondent

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed January 7, 1938

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board (hereinafter referred to as the Board), pursuant to the authority conferred upon it by the provisions of an Act of Congress, approved July 5, 1935 (49 Stat. 449, Chap. 372; U. S. C. Title 29, sections 151-166), known as the National Labor Relations Act, respectfuly petitions this Honorable Court for the enforcement of a certain order issued by said Board in a proceeding instituted by it against respondent, the Ford Motor Company. Said proceeding is known upon the records of the Board as Case No. C-199, the title thereof being "in the matter of Ford Motor Company and International Union, Automobile Workers of America."

In support of this petition, the Board respectfully shows:

(1) Respondent is, and at all times hereinafter mentioned was, a corporation duly organized under and existing by virtue of the laws of the State of Delaware and has and maintains its principal executive offices at the city of Dearborn, State of Michigan. Respondent's plants involved in [fol. 2] this proceeding are located at the city of Highland Park and at the city of Dearborn, both in the State of Michigan.

2. By reason of the matters alleged in paragraph 1, this court has jurisdiction of this petition by virtue of Section 10(e) of the said National Labor Relations Act.

(3) Charges having been filed with the Regional Director of the Board for the Seventh Region by the International Union, United Automobile Workers of America, the Board, by its said Regional Director, issued on June 26, 1937, its complaint in said proceeding No. C-199, alleging that respondent had engaged and was engaging in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, which complaint, together with a notice of hearing thereon, was served upon respondent. On July 3, 1937, respondent filed its answer to the complaint.

(4) Thereafter, the Board, by John T. Lindsay as Trial Examiner duly designated by the Board, held a hearing in Detroit, Michigan, on July 6, 1937 to July 30, 1937, at which testimony and other evidence with respect to the allegations of the complaint were adduced. The respondent appeared at the hearing by counsel, participated therein, and offered evidence in its behalf. During the hearing amendments to the complaint were made and answers filed thereto. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded to all parties. Respondent's original answer contained a motion to dismiss the complaint on various grounds. This motion to dismiss was made at the commencement of the hearing, and renewed at the conclusion of the Board's case, at the conclusion of Respondent's case, and at the conclusion of the hearing. The motions were denied by the Trial Examiner. Exceptions to these and other rulings of the Trial Examiner at the hearing were taken by the respective parties.

[fol. 3] (5) By order of the Board, dated August 3, 1937, the proceeding was transferred to and continued before the Board in accordance with Article II, Sec. 37 of the National Labor Relations Board Rules and Regulations, Series I, as amended.

(6) Thereafter, on the 22nd day of December, 1937, the Board, having first considered the matter and being sufficiently advised in the premises, and being of the opinion upon all the testimony and evidence that the respondent had been and then was engaged in certain unfair labor practices affecting commerce within the meaning of said National Labor Relations Act, duly stated its findings of fact and

issued and entered the following order directed to respondent, its officers, agents, successors and assigns:

"Order

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board herby orders that the respondent, Ford Motor Company, its officers, agents, successors and assigns shall:

"1. Cease and desist from:

"(a) Discouraging membership in International Union, United Automobile Workers of America or any other labor organization of its employees by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of their membership in, activity in behalf of, or sympathy toward any such labor organization;

"(b) Dominating or interfering with the formation or administration of Ford Brotherhood of America, Inc., or any other labor organization of its employees, or contributing financial or other support to any such labor organization;

"(c) Organizing, maintaining, supporting or assisting vigilante or similar groups, or employing or using such groups, the members of its Service Department, or any other persons, directly or indirectly, for the purpose of intimidating or coercing its employees from joining International Union, United Automobile Workers of America or any other labor organization of its employees;

"(d) Threatening, assaulting, beating, or in any other manner interfering with, restraining, or intimidating, directly or indirectly, members of International Union, United Automobile Workers of America or any other labor organization of its employees distributing or otherwise disseminating union literature in the vicinity of its River Rouge plant;

"(e) Circulating, distributing or otherwise disseminating among its employees statements or propaganda disparaging or criticizing labor organizations or advising its employees not to join such organizations;

[fol. 4] "(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer to George Onnela, Richard Weyhing, Clarence Fleming, Elmer Mackie, Thaddeus Radke, Alfred Onnela, Ray Onnela, Martin Jensen, Clifford Sheldon, John J. Dovey, Anthony J. Schipper, Fred Nygard, George B. Zubick, Joseph Gutierrez, John Barron, Joseph Sable, Alphonse Kuzulis, Homer King, Percy Llewellyn, Joseph Nierotko, George Smick, Joseph Galusky, Hector F. Manseau, Birtus C. Hall, Emil Tomkow, Joseph Bailey, John Cwikiel, Fred Gullickson, and Jacob Winsiewski immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

"(b) Make whole the persons named in paragraph 2(a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each would have earned as wages during the period from the date of such discrimination against him to the date of the offer of reinstatement, less any amount each has earned during that period;

"(c) Post immediately in conspicuous places throughout all departments of its plants in Dearborn and Highland Park, Michigan, notices to its employees stating that the respondent will cease and desist in the manner aforesaid;

"(d) Maintain such notices for a period of at least sixty (60) consecutive days from the date of posting;

"(e) Notify the Regional Director for the Seventh Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

"And it is further ordered that the allegations of the complaint be, and they hereby are, dismissed with respect

to Raymond Jewell, George Sazynski, Guiseppe Gregorio, Gabriel Bobaila, Leo J. Krugh, and Daniel Devor."

(7) Said order is and at all times since its issuance has been in full force and effect.

(8) Thereafter, on the 23rd day of December, 1937, said order was served upon respondent by personal service of a copy thereof upon respondent's attorney of record in the said proceeding C-199, and by leaving a copy thereof at the principal office of the respondent at Dearborn, Michigan.

(9) Thereafter, on January 3, 1938, respondent filed with the Board its petition to vacate and set aside the Board's decision and order and for rehearing, which petition the [fol. 5] Board denied on January 4, 1938.

(10) Respondent has failed to comply with said order of the Board and has announced that it has no intention to comply therewith, and the Board is advised and believes and accordingly alleges that the respondent will not comply therewith unless and until required so to do by this Honorable Court.

Wherefore, the Board petitions this Honorable Court for the enforcement of its order of December 22, 1937; and pursuant to Section 10(e) of said National Labor Relations Act, is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact and the order of the Board.

The Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in such transcript and upon the order made thereon a decree enforcing in whole said order of the Board and requiring respondent, its officers, agents, successors, and assigns to comply therewith.

(S.) J. Warren Madden, Chairman; (S.) Edwin S. Smith, Member, National Labor Relations Board. (S.) Charles Fahy, General Counsel. (S.) Robert B. Watts, Associate General Counsel.

[fol. 6] *Duly sworn to by J. Warren Madden and Edwin S. Smith. Jurats omitted in printing.*

[fol. 7] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD—Filed January 7, 1938

The National Labor Relations Board, by its Secretary, duly authorized by Section 1 of Article VI of the Rules and Regulations of the National Labor Relations Board, Series 1 as amended, effective April 28, 1936, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," the same being Case No. C-199 before said Board, such transcript including the pleadings, testimony, and evidence upon which the order of the Board in said proceedings was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Charge filed by International Union, United Automobile Workers of America, and sworn to May 24, 1937.

2. Supplemental charge filed by International Union, United Automobile Workers of America, and sworn to June 26, 1937.

3. Charge filed by John J. Dovey, and sworn to on June 24, 1937.

[fol. 8] 4. Charge filed by Clifford Sheldon, and sworn to June 24, 1937.

5. Charge filed by Joseph Galusky, and sworn to on June 24, 1937.

6. Complaint and notice of hearing issued by the National Labor Relations Board on June 26, 1937.

7. Answer filed by respondent, verified July 2, 1937.

8. Copy of order designating John T. Lindsey Trial Examiner, dated June 30, 1937.

9. Amendment of complaint to conform to proof.

10. Charge filed by Homer King, and sworn to June 24, 1937.

11. Amendments to paragraphs 16 and 19 of the complaint.

12. Amendment to paragraph 17 of the complaint.

13. Charge filed by International Union, United Automobile Workers of America, and sworn to July 12, 1937.

14. Answer of respondent to second amendment to complaint, verified July 14, 1937.

15. Answer of respondent to third amendment to complaint, verified July 14, 1937.

16. Amendment of complaint to conform to proof, dated July 19, 1937.

17. Motion to intervene filed by Ford Brotherhood of America, Inc., and verified July 3, 1937.

Documents listed hereinabove under items 1-17, inclusive, are contained in the Exhibits and included under the following item:

18. Stenographic transcript of the testimony before John T. Lindsay, Trial Examiner of the National Labor Relations Board, on July 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, [fol. 9] 23, 26, 27, 28, 29, and 30, 1937, including all exhibits introduced in evidence.

19. Copy of order transferring proceeding to National Labor Relations Board dated August 3, 1937.

20. Copy of caveat filed by the Ford Brotherhood of America, Incl., dated September 13, 1937. (The copy of the motion to intervene referred to in and attached to this caveat as filed with the Board, is the document described in and certified under item 17 hereof and is therefore omitted here.)

21. Copy of decision, findings of fact, conclusions of law, and order of the National Labor Relations Board issued December 22, 1937.

22. Affidavit of service of decision on Louis J. Colombo, Jr., attorney for Ford Motor Company, sworn to December 23, 1937.

23. Affidavit of service of decision on Ford Motor Company, sworn to December 23, 1937.

24. Affidavit of service of decision on International Union, United Automobile Workers of America, sworn to December 23, 1937.

25. Affidavit of service of decision on Maurice Sugar, attorney for International Union, United Automobile Workers of America, sworn to December 23, 1937.

26. Copy of petition to vacate and set aside the decision and order of the Board and for rehearing, filed by Ford Motor Company with the Board on January 3, 1938.

27. Copy of order of the Board, dated January 4, 1938, denying petition of Ford Motor Company to vacate and set aside decision and order and for rehearing.

In Testimony Whereof, the Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of [fol. 10] the National Labor Relations Board in the City of Washington, District of Columbia, this 6th day of January, 1938.

Nathan Witt, Secretary, National Labor Relations Board. (Seal.)

[fol. 11] IN UNITED STATES CIRCUIT COURT OF APPEALS

SUPPLEMENTAL CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD—Filed January 10, 1938

Supplementing its certificate, dated January 6, 1938, of the transcript of the record in the proceeding entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," the same being Case No. C-199 before the Board, the National Labor

Relations Board, by its Secretary, duly authorized by Section 1 of Article IV of the Rules and Regulations of the National Labor Relations Board, series 1, as amended, hereby certifies that the document annexed hereto is a part of the transcript of the record in the aforesaid proceeding before the Board.

Fully described the document annexed hereto is as follows:

Return of respondent to the decision and order of the Board in the aforesaid matter in response to paragraph 2(e) of such order.

In Testimony Whereof, the Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 7th day of January, 1938.

Nathan Witt, Secretary, National Labor Relations Board. (Seal.)

[fol. 12–12-1] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

ANSWER TO PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed April 11, 1938

Now comes the Ford Motor Company, respondent herein, and answering the petition filed herein, respectfully shows:

1. Respondent admits the allegations of paragraphs (1), (3), and (5) of said petition.

2. Respondent denies the allegations of paragraph 2 of said petition.

3. Respondent admits the allegations of paragraph (4) of the petition herein except that it denies that full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded to respondent.

[fol. 12-2] 4. Respondent denies that on the 22nd day of December, 1937, or at any other time, the petitioner (hereinafter called the Board) considered this matter, or was ever sufficiently advised in the premises, or ever reached an opinion upon the testimony and evidence that respondent had violated the National Labor Relations Act, or duly stated its findings of fact, or issued or entered the purported Order set forth in haec verba in paragraph (6) of said petition, or any other order in this proceeding directed to respondent, its officers, agents, successors or assigns.

5. Answering paragraph (7) of said petition, respondent denies that said purported order is in effect, and denies that at any time since its purported issuance it has been in effect.

6. Answering paragraph (8) of said petition, respondent denies that on the 23rd day of December, 1937, or at any other time, said purported order was served upon respondent, or upon any person authorized to accept service in its behalf, as required by Section 10 (c) of the National Labor Relations Act. Respondent alleges that on the 23rd of December, 1937, there was delivered to respondent's attorney of record in the proceeding before the Board an unsigned, unauthenticated and uncertified mimeographed document entitled in said proceeding and headed "Decision and Order", and that on the same date there was delivered to respondent at its principal office at Dearborn, Michigan, a document of the same description but denies that the same constituted service of an order as required by said Act.

7. Answering paragraph (9) of said petition, respondent admits that on January 3, 1938, it filed with the Board its petition to vacate and set aside the purported decision and order of the Board and for rehearing, which petition the Board denied on January 4, 1938, but respondent alleges that at the time of the denial of said petition the Board had [fol. 12-3] not given due and proper consideration thereto. A true copy of said petition is annexed hereto as Exhibit A and is hereby made a part hereof.

8. Respondent denies the allegations of paragraph (10) of said petition. Further answering the allegations of said paragraph, respondent alleges that on January 5, 1938, it filed with the Board its return to said purported order, a true copy of which return is annexed hereto as Exhibit B and is hereby made a part hereof; that since the purported

service of said purported order on it and since the date of said return it has not committed any act or engaged in any practice which constitutes a violation of the provisions of said purported order, and that it has no intention of committing in the future any act, or of engaging in any practice which will constitute a violation thereof, except in the respects set forth in said return.

9. Said purported order and each and every part thereof is invalid and void because unaccompanied and unsupported by any findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

10. Said purported order and each and every part thereof is invalid and void because the purported findings of fact, if any, upon which it is based are not findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

11. Said purported order and each and every part thereof is invalid and void because the purported findings of fact upon which it is based are, in material and controlling respects, not supported by evidence, within the meaning of the provisions of Section 10 of the Act, and are contrary to the evidence, and also because said purported findings of fact are inadequate, incomplete and insufficient in that material [fol. 12-4] facts which are conclusively established by the evidence have been disregarded and ignored by the Board, and also because said purported findings of fact disregard and ignore matters of current history material to the issues which are common knowledge and which the Board in the exercise of its quasijudicial powers ought to have taken into consideration.

12. The Trial Examiner by whom the Board held its hearing interrogated many of the witnesses, not in a fair, dispassionate and impartial manner for the purpose of eliciting the truth, but in such manner as to cause them to believe that he desired them to give testimony unfavorable to respondent and to withhold testimony favorable to respondent, and in such manner as to cause them to believe that they could with impunity give partial, misleading and false testimony, provided the effect produced thereby was unfavorable to respondent.

13. Said Examiner overruled proper objections of counsel for respondent to questions which counsel for the Board asked witnesses, and sustained improper objections of counsel for the Board to questions which counsel for respondent asked witnesses.

14. Said Examiner completely ignored not only the rules of evidence generally prevailing in courts of law and equity but also the fundamental principles of the law of evidence and the basic principles of justice, and accepted evidence having no probative value and worthy of no credence, and which would not be relied on by responsible persons in their own serious affairs, and which did not meet the test laid down by the Board itself (NLRB 1st An. Rep. 23) as being the kind of evidence that would affect fair-minded men in the conduct of their daily and more important business.

15. Said Examiner conducted himself at said hearing as an advocate opposed to respondent, with a view to caus- [fol. 12,5] ing the record of said hearing to be adverse to respondent, and thereby and in other respects failed to perform his duties as agent of a judicial or quasi-judicial body.

16. By reason of the matters alleged in the foregoing paragraphs 12 to 15, inclusive, said purported order and each and every part thereof is invalid and void because respondent was denied the full and fair hearing required by the Act and guaranteed by the Fifth Amendment of the Constitution of the United States.

17. From August 3, 1937, when the proceedings before the Board were transferred to it, as alleged in paragraph 5 of the petition, until December 23, 1937, when the purported decision and order of the Board were purported to have been served upon respondent, the Board communicated in no way with respondent with respect to said proceeding, and the Board at no time afforded to respondent any opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or to any proposed order.

18. By its acts and omissions as alleged in paragraph 17 hereof, the Board, without notice to respondent, departed from the normal procedure contemplated by the Rules and Regulations of the Board, and failed to accord respondent a full and fair hearing as required by the Act and the due process clause of the Fifth Amendment.

19. Neither the Board nor any member thereof was personally present at the taking of testimony or saw or heard any of the witnesses at said hearing testify.

20. Upon information and belief, neither the Board nor any member thereof read the testimony of the witnesses who testified before the Trial Examiner or read or inspected the exhibits received in evidence.

[fol. 12-6] 21. Upon information and belief, neither the Board nor any member thereof judicially weighed or appraised the evidence received at said hearing.

22. Upon information and belief the purported decision and order of the Board in substantially the form in which it was purported to have been served upon the respondent was prepared by subordinates of the Board and not by the Board or any member thereof.

23. Upon information and belief, between August 3, 1937, and December 23, 1937, it was the practice of the Board in proceedings transferred to it to submit the records therein to a so-called Review Section, composed of subordinates of the Board, for the purpose of analyzing such records and for the preparation of proposed findings of fact.

24. Upon information and belief, between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section for the preparation of proposed findings of fact, which were thereafter prepared by said Review Section and submitted to the Board, without notice to respondent, and without affording to respondent any opportunity to object or except thereto.

25. Upon information and belief, from the period between August 3, 1937, and December 23, 1937, it was the practice of the Board in proceedings transferred to it to submit the records therein to said Review Section for the preparation of proposed conclusions of fact and law, and proposed terms of an order, as well as for the preparation of proposed findings of fact.

26. Upon information and belief, that between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section,

[fol. 12-7] which thereafter prepared proposed conclusions of fact and law and proposed terms of an order, and submitted the same to the Board, without notice to respondent, and without affording to respondent any opportunity to object or except thereto.

27. The record in the proceeding before the Board submitted to said Review Section as aforesaid was not submitted pursuant to any order made by the Board and served upon or communicated to the respondent, and the Board at no time made known to respondent the identity of the persons to whom said record was so submitted.

28. Upon information and belief, after transfer of the proceedings to the Board, certain subordinates of the Board prepared proposed findings of fact, conclusions of fact, and law, and proposed terms of an order, and submitted the same to the Board, without notice by the Board to respondent and without affording to respondent any opportunity to object or except thereto.

29. By each of its acts and omissions as alleged in the foregoing paragraphs 24, 26, 27 and 28, and by all of said acts and omissions taken together, the Board departed from its own rules of procedure, by which it is provided that, where an intermediate report is prepared for submission to the Board, the same shall be served upon the respondent and opportunity afforded to except thereto.

30. Upon information and belief, neither the Board nor any member thereof read any fair condensation or analysis of the evidence received at the hearing before the Trial Examiner.

31. Upon information and belief, the Board, in making its findings of fact, conclusions and purported order, relied either solely or in part upon the proposed findings, con-
[fol. 12-8] clusions and order prepared by its subordinates and submitted to the Board as stated in the foregoing paragraphs 24, 26, 27 and 28.

32. Respondent was never accorded by the Board and did not receive any opportunity to inspect said proposed findings, conclusions and order or to object or except thereto or to point out any errors or improper statements or improper inferences or improper conclusions or im-

proper terms of order therein, or to urge that said proposed findings were not in accordance with the evidence.

33. Upon information and belief, the Trial Examiner, who saw and heard the witnesses testify at the hearing, did not prepare or submit to the Board any intermediate report, or any proposed findings of fact or any recommendations as to findings of fact, and did not inform the Board as to his opinion or belief as to the credibility of the several witnesses who testified at the hearing.

34. Upon information and belief, that the Board received from its subordinates, including its attorney who conducted the hearing on its behalf before the Trial Examiner, reports, memoranda and other communications containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; that the Board in making its order relied in part upon said reports, memoranda and communications, without personally checking or weighing or appraising the evidence in order to determine whether or not said inferences and conclusions were justified, and without affording respondent any opportunity to test, refute or explain said inferences, conclusions or matters extrinsic to the record.

35. Upon information and belief, the Board in making its purported order was not, as it ought to have been, guided solely by the evidence, but in reaching its con- [fol. 12-9] clusions was improperly influenced by extraneous considerations, political and otherwise.

36. Upon information and belief, the findings contained in the purported decision and order of the Board were not its findings, and were not made as a result of judicial consideration or weighing or appraisal of the evidence by it, but were the findings of its subordinates, who under the Act had no authority to make any findings.

37. Respondent was without knowledge of the matters alleged in the foregoing paragraphs 20 to 35, inclusive, hereof until after December 23, 1937, and is without knowledge as to the identity of the subordinates of the Board referred to in said paragraphs.

38. By reason of the matters alleged in the foregoing paragraphs 17 to 37, inclusive, said purported order and

each and every part thereof is invalid and void because respondent was denied a full and fair hearing as required by the National Labor Relations Act and guaranteed by the Fifth Amendment to the Constitution of the United States.

39. By reason of the matters alleged in the foregoing paragraphs 21 to 37, inclusive, said purported order and each and every paragraph thereof is invalid and void because the Board unlawfully delegated to its subordinates powers conferred upon it by said Act, or the exercise of a substantial part thereof.

40. The Board in its purported findings of fact referred to and relied upon evidence of a patently incompetent, unreliable and prejudicial character.

41. In the making of its purported findings and order, the Board failed to consider facts and circumstances required to be considered, and its purported findings do not embrace basic facts required to support the order.

[fol. 12-10] 42. The Board included in its purported findings of fact statements which are supported by no evidence whatever and statements which misrepresent the evidence in material respects.

43. The Board phrased its purported findings of fact in language, and included in its purported findings sentences and paragraphs, not appropriate to a statement of findings of fact but calculated to and having the effect of castigating respondent before its employees and the public generally, and of supplying material for reproduction in the press.

44. The Board relied in its purported findings of fact upon evidence which the Examiner had excluded by rulings which the Board in its order affirmed.

45. The Board made its purported order and the purported findings of fact upon which its order is based without first having accorded to respondent the substance of a full and fair hearing, the hearing in this proceeding being inadequate in the respects set forth in the foregoing paragraphs 12 to 39, inclusive.

46. By reason of the matters alleged in the foregoing paragraphs 40 to 45, inclusive, and other matters, said pur-

ported order is invalid and void because the Board, in making said purported order and the purported findings of fact upon which said order is based, did not act in a judicial or quasi-judicial manner as is required by Section 10 of the Act and by the due process clause of the Fifth Amendment to the Constitution.

47. Upon information and belief the purported decision and order of the Board was not its order but was the order of its subordinates, and the purported conclusions of the Board were not the conclusions of the Board made as a result of its judicial consideration or weighing and ap- [fol. 12-11] praising of the evidence but were the conclusions of its subordinates who, under the Act, had no authority to make said order or conclusions.

48. The Board arbitrarily refused to set aside its purported order and grant to respondent a rehearing for the purposes set forth in the above-mentioned petition filed with the Board on January 3, 1938, and thereby abused its discretion.

49. Said purported Order, and each and every part thereof, is invalid and void because none of the acts found by the Board to have been done by respondent occurred in commerce, or burdened or obstructed commerce or the free flow of commerce, or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, within the meaning of the Act when construed in the light of constitutional limitations upon the powers of Congress, including the Tenth Amendment to the Constitution, and because the Act, if construed to apply to the acts found by the Board to have been done by respondent, is, as so construed, unconstitutional and void in that it attempts to regulate matters not within the powers conferred upon Congress by the Constitution and violates the Tenth Amendment thereto, and because the acts found by the Board to have been done by respondent are, individually and collectively, so minor in character, scope and duration that their possible effect upon interstate commerce is only indirect, remote, incidental and collateral.

50. The findings of the Board are not supported by the weight of the evidence, and are therefore void and invalid

in that Section 10(e) of the National Labor Relations Act, in so far as it provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" violates Article III, of the Constitution of the United States, [fol. 12-12] in that it purports to grant judicial power to a non-judicial tribunal whose members hold office for limited terms, for terms not solely dependent on good behavior, and are removable otherwise than by impeachment, and which tribunal is neither the Supreme Court nor an inferior court ordained and established by the Congress.

51. The provision contained in Section 10(e) of the National Labor Relations Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", if so interpreted as to require the Court to enter a decree enforcing provisions of the order without its weighing the evidence or giving any consideration thereto other than for the purpose of seeing whether there is some evidence to support the order and the purported findings of fact upon which based, without consideration of any other facts or circumstances of equitable cognizance, and without considering for itself whether the conduct of the respondent is sufficient to warrant the entry of a decree of enforcement having the effect of an injunction issuing out of a court of equity, and without the exercise of any judicial discretion whatever, is repugnant to Article III of the Constitution of the United States whereby the judicial power of the United States is expressly and exclusively conferred upon the Supreme Court of the United States and such inferior courts as Congress may from time to time establish, and to the provisions of Article V of the Amendments to the Constitution of the United States, whereby it is provided that no person shall be deprived of life, liberty or property without due process of law.

52. Paragraph 1 of the purported order herein exceeds in scope any order which the Board may lawfully make under the National Labor Relations Act on the record and findings in the proceedings before it.

[fol. 12-13] 53. By reason of the matters and things alleged in paragraph 8 hereof, no existing case or controversy exists between the Board and respondent in respect of paragraphs 1(a), (b), (c), (d) and (f) of the Board's purported order within the judicial power of the United States as

defined in Article III of the Constitution of the United States.

54. Paragraph 1(a) of said purported order is invalid and void because the purported findings of the Board that respondent discharged 29 of the more than 80,000 persons employed at its River Rouge plant under circumstances constituting an unfair labor practice is insufficient to support any order directing respondent to cease and desist from discharging any of its employees in the future.

55. Paragraph 1(d) of said purported order is invalid and void because there is no finding of fact and no evidence to support any finding of fact that the persons found by the Board to have been threatened, assaulted or beaten were employees of respondent.

56. Paragraph 1(d) of said purported order, in so far as it orders respondent to cease and desist from in any manner interfering with, restraining or coercing any person other than employees of respondent, is invalid and void because it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact or upon any basis whatsoever.

57. Paragraph 1(d) of said purported order is invalid and void in that said paragraph purports to deprive respondent of its lawful right to take appropriate action to eject trespassers from its property and to prevent its employees from engaging in acts on or in the vicinity of its property which would be calculated or would tend to interfere with the ingress and egress of persons to and from respondent's plant and to cause breaches of the peace among employees of respondent.

[fol. 12-14] 58. Paragraph 1(d) of said purported order is invalid and void because the Act is inapplicable to acts of physical violence.

59. Paragraph 1(e) of said purported order is invalid and void because not authorized by any provision of the Act when construed in the light of the requirements of the First Amendment to the Constitution and because, if the Act be construed to authorize said Paragraph 1(e), the Act is to that extent unconstitutional and void as an abridgement of the freedom of speech and of the press in violation of the First Amendment to the Constitution.

60. Paragraph 1(f) of said purported order is invalid and void because, being a restatement of the provisions of Section 7 and Section 8(1) of the Act, it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact.

61. Paragraphs 2(a) and 2(b) of said purported order are invalid and void because they are not supported by any finding of the Board that the persons named in said paragraphs have been reasonably diligent in seeking employment elsewhere or that said persons have not had and rejected opportunities to obtain substantially equivalent employment elsewhere or that said persons have ever requested respondent to reinstate them.

62. Paragraph 2(b) of said purported order is invalid and void because it fails to provide that the payments to be made by respondent to each of the persons named in paragraph 2(a) of said order shall equal the amount which each such person would have earned as wages during the period from the date of his discharge to the date of the offer of reinstatement, less any amount which, with the exercise of reasonable diligence, he would have earned during that period and any amount received by him from any source by reason of his unemployment, and thereby fails to effectuate the policies of the Act, and because it fails to provide any [fol. 12-15] method or procedure for the determination of the amount to be paid by respondent to the persons referred to therein.

63. Paragraphs 1(a), 1(b), 1(c) and 1(d) of said purported order, in so far as they order respondent to cease and resist from engaging in certain practices with respect to any labor organization or the members of any labor organization other than the particular labor organization named in each of said respective paragraphs, are invalid and void because they are unsupported by the purported findings of fact and exceed the issues raised in the proceeding.

64. Paragraph 2(c) of said purported order is invalid and void because there is no evidentiary finding by the Board, and no evidence to support any evidentia y finding, that the action ordered therein to be taken will effectuate the policies of the Act, and because such action will not

effectuate the policies of the Act, and because said paragraph fails to set forth in words and figures the notice required to be posted by respondent, and because the Act, when construed in the light of the requirements of the Fifth Amendment to the Constitution, does not authorize the Board to order respondent to state that it has heretofore engaged in any unfair labor practice.

Wherefore, the respondent prays that the petition herein be denied and dismissed, and that the purported order of the Board be set aside and the proceeding remanded to the Board with directions to dismiss the complaint, and respondent prays for such other and further relief in the premises as may be just and proper.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent.

Dated April 11, 1938.

[fol. 12-16] EXHIBIT "A" TO ANSWER

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of FORD MOTOR COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA

PETITION OF FORD MOTOR COMPANY TO VACATE AND SET ASIDE DECISION AND ORDER AND FOR REHEARING

Now comes Ford Motor Company and, reserving to itself all exceptions and objections to the jurisdiction of the Board in the above-entitled matter and to the validity of its decision and order herein upon constitutional grounds, upon the ground that in making the same the Board exceeded its statutory authority, upon the ground that it failed to follow the procedure laid down in the National Labor Relations Act, and upon the grounds that its findings of fact are unsupported by substantial evidence and are contrary to the weight of the evidence and are insufficient to support the order made, files herein with the Board its petition to vacate and set aside the decision and order herein, and for

a rehearing, and files copies of said petition with the Regional Director of the Board for the Seventh Region.

[fol. 12-17] I

The Policy of the Company

The findings and order of the Board are based upon a misapprehension of the policy of the Ford Motor Company and its founder, Henry Ford, towards the employees of the Company. It is a matter of common knowledge that the Company and its founder have been pioneers in the payment of high wages, reduction in the hours of labor and the improvement of working conditions. This policy has been carried out without compulsion from any outside force and long antedates the passage of the National Labor Relations Act.

The Board itself in its report refers to statements made by Mr. Ford from time to time as "indicative of the respondent's attitude" because "coming from the respondent's dominant figure." The excerpts therefrom quoted in the report makes it plain that Mr. Ford is of the opinion that the employees of the Company are better off outside a union than in one—an opinion which would seem to be justified by the facts stated above. Whether this is so or not, which it is not for the Board to determine, Mr. Ford in so expressing himself was exercising the right of free speech guaranteed by the Constitution of the United States, with which the Board has no authority to interfere, as it has attempted to do in its order.

At the same time, the Company and its founder have recognized the right of every employee to join a union or not, as he pleases. This is demonstrated by the evidence offered by counsel for the Board. Among the documents so offered was an interview given by Mr. Ford to the North American Newspaper Alliance on April 29, 1937, reprinted and disseminated by the Company among its employees (Board Exhibit 111). In the course of this interview Mr. Ford was asked the following question and made the following answer:

[fol. 12-18] "But do you propose to put up stiff opposition to any group that undertakes to bring your workmen into labor unions?" Ford was asked.

"I have never sought to prevent our men from joining any association—religious, racial, political or social," Ford replied. "No one who believes in American freedom would do that. When our men ask about unions, I give them the same advice as when they ask about any of the other schemes that are always being aimed at men's wages. I say to them: 'First, figure out for yourself what you are going to get out of it. If you go into a union, they have got you, but what have you got?'"

"We think our men ought to consider whether it is necessary for them to pay some outsider every month for the privilege of working at Ford's. Or, whether any union can do more for them than we are doing."

Other parts of the interview are quoted in the report, but the excerpt quoted above was omitted therefrom. It is, nevertheless, the only portion of the interview which is relevant to the policy of the Ford Motor Company on the subject of interference or non-interference with the liberty of employees to join a union or not, as they wish. This is a plain and unambiguous statement of the attitude of the respondent and its founder towards unions, namely, that in their opinion its employees are better off out of a union than in it, but that they may join if they choose.

In view of the introduction into evidence by the Board of Mr. Ford's statement of policy, it seemed unnecessary for the respondent to introduce additional evidence with respect thereto. Upon rehearing, however, the respondent is prepared to and will prove that the policy and practice of the Company is one of non-interference and that those entrusted with the employment and discharge of its employees have been directed not to discriminate either in favor of or against members of any labor union.

[fol. 12-19] II

Conditions in Michigan

The decision and order reflect a failure on the part of the Board to take into account the conditions existing in Michigan at the time of the events treated in the report. These conditions provide a necessary background for a true understanding and fair appraisal of the events treated in the report.

For a period of six months prior to May 26, 1937, there had been active in the State of Michigan a group of men representing the Committee for Industrial Organization (hereinafter called the C. I. O.) and its affiliate, International Union, United Automobile Workers of America (hereinafter called the U. A. W.), who had deliberately violated the law of the State of Michigan against trespass on private property, and had openly expressed their intention and purpose of so doing.

The policy adopted and openly avowed by the C. I. O. and U. A. W. was that, in the very midst of an era of production and prosperity, the workers in a plant should not merely lay down their tools and cease to work, but should occupy the plant and prevent those who desire to work from doing so.

In the epidemic of C. I. O. and U. A. W. sit-down strikes that swept the State of Michigan, industrial plants were seized by force and their production suspended. Men wishing to work were forcibly prevented from doing so and even forcibly restrained from leaving the seized plants. The Governor of the State of Michigan announced that ordinary agencies for law enforcement could not or would not function. Whether the Governor was forced to this by the action of C. I. O., or whether the fault was his own, is not the question here.

The important point here is that industrial plants were in fact seized and their production was in fact suspended, that [fol. 12-20] men wishing to work were in fact thrown out and their families placed on relief, that the treasury of the State was in fact depleted to pay for the relief, and that purchasing power was destroyed.

Under these circumstances, the Ford Motor Company determined that in so far as it lay within its power and control over its own property, and in so far as it could do so consistently with obedience to all laws, whether local, State or Federal, it would resist any such attempted seizure of its plants by C. I. O. or U. A. W. organizers as had been experienced by General Motors Corporation and Chrysler Corporation, and would, above all, protect those of its workers who might desire to continue to work, from being forcibly prevented from doing so.

That this was a serious problem, was apparent not merely from the existence of the facts which we have mentioned, but from the concrete evidences of the violent consequences

that occurred in the history of the State of Michigan during that six months' period. To cite but a single example, at Flint, Michigan, there was a pitched battle between police and pickets, at which shots were fired and men killed, while workingmen, who were unlawfully occupying the plant itself at the instigation of C. I. O. and U. A. W., tore up machinery and hurled it as missiles through the windows.

At the original hearing the respondent, believing that the history of the times would be taken into account by the Board, did not tender evidence on the subject. The respondent now offers to prove these facts upon rehearing.

III

Occurrences of May 26, 1937

By reason of the aforesaid circumstances, the respondent and its employees who wished to remain at work had, for some time prior to May 26, 1937, anticipated an invasion [fol. 12-21] of the property and plant of the Company by U. A. W. and an effort forcibly to stop its operation by means of a sit-down strike. In repeated demonstrations by U. A. W., its marchers or adherents carried banners or placards bearing such legends as "General Motors now. Ford next.", and "Chrysler now. Ford next." The respondent, therefore, rightly and properly made preparations to resist any such invasion. The only instructions given were instructions to prevent such invasion and sit-down strike.

It is the contention of the respondent that the Board's findings that the respondent was responsible for the violence which ensued are without support in the record. The remarkable fact about the episode of May 26, when viewed in the light of its background, is as to how little breach of the peace in fact happened.

In other plants in the State of Michigan, similar factors had given rise to breaches of the peace of the greatest violence lasting over periods of days and weeks. At the Ford plant, the matter passed off with a few fist fights, which, however deplorable, should not blind the Board to a judicial recognition of their comparative insignificance.

The directions of the responsible officials of the Ford Motor Company were that if the C. I. O. or U. A. W. representatives wished only to distribute pamphlets, they should not in any way be interfered with, but that they

should not be permitted to enter upon Ford property. These directions were given in the light of the experience at General Motors, Chrysler and other plants in Michigan, at which representatives of the C. I. O. and U. A. W., or employees instigated by them, had succeeded in actually taking over the plants and disrupting production.

That a trespass on Ford property was bound to lead to breach of the peace, will be established by evidence of the intense feeling existing at the time on the part of the employees of the Ford plant who wished to avoid the loss of [fol. 12-22] their jobs and wages, and the consequent impoverishment of their wives and families, such as had been suffered and protested against by men who had been thrown out of work through similar interruptions at General Motors, Chrysler and other plants.

The C. I. O. and U. A. W. representatives had been stating for some days that they would march out to the Ford plant. This inevitably gave rise both to defensive preparations on the part of the Ford Service Department, whose job is to guard the premises of the largest industrial plant in the world, and also to a feeling of tension and suppressed excitement on the part of its members which might easily and naturally, under such provocation, have led to real violence. That this was avoided is, under the circumstances, a testimonial to the determination of the Ford Motor Company not to resort to brutality, but at all costs to avoid it.

Throughout the period of the rough and tumble but evidently isolated and sporadic brawls outside the plant, the members of the Service Department did not move out to aid the individual Ford employees who happened to be participating therein, or to molest or attack the C. I. O. and U. A. W. representatives who had provoked them. So far as the Company itself is concerned (and the Company is the sole respondent in this proceeding), it is respectfully submitted that this is the one significant and outstanding fact, and that in the light of it the picture painted by the report of the Board is erroneous and unfair to the Company, and should be corrected.

Of secondary importance is the fact that numerous of the descriptive paragraphs of the report of this Board, lurid as they are as to detail, are based on hearsay and surmise. Since the date of the hearing herein, the facts have been clarified by the decision of the Supreme Court

of Michigan that even the most severe injury (that to Merriweather) was not felonious, but was a case of simple assault and battery not intended to cause serious bodily injury.

[fol. 12-23] If rehearing be granted herein, the respondent is prepared to offer and will offer evidence that the acts of violence were not committed at the direction or with the authority of the respondent.

IV

Situation since May 26, 1937

Since the close of the hearings herein representatives of C. I. O. and U. A. W. upon seven separate occasions have again visited the vicinity of the Ford plant for the purpose of distributing literature. On each occasion, as on May 26, the literature was essentially scurrilous in character and libelous of the Company and of Mr. Ford. And, as on May 26, no adequate remedy at law existed in favor of the Company or Mr. Ford, for the literature was circulated by persons of no financial responsibility, acting at the instigation and under the direction of the lawless groups known as C. I. O. and U. A. W.

Upon no one of these occasions did said persons undertake to enter upon the premises of the respondent. On each of said occasions, as on May 26, the Company had made preparations to resist such entry, if attempted. But on each of these occasions, since no entry was attempted, the persons making distribution of literature were not interfered with or molested by the Company or its employees.

Upon a rehearing, the respondent will offer evidence to prove these facts.

In view of the foregoing circumstances, it is respectfully submitted that the occurrences of May 26, 1937, represent matters properly to be dealt with solely by the local authorities of the State of Michigan and cannot be made the predicate for any injunction order in the future.

[fol. 12-24]

V

The So-called Ford Brotherhood of America, Inc.

The statements in the report that "the respondent fostered a 'dummy' labor organization of its own choice—the Ford Brotherhood of America, Inc." and "that the

respondent has dominated and interfered with the formation and administration of this organization and has contributed support to it", are unsupported by the record and are contrary to the facts. In view of the complete failure of the proof to support this charge, it seemed unnecessary for respondent to introduce any evidence in respect thereof.

The facts with respect to the Brotherhood are that its organization was instigated by an individual not employed by or connected with the Company; that this individual obtained the cooperation of a group of employees of respondent, who thereupon organized the Brotherhood and solicited membership therein within the plant; that when such solicitation came to the knowledge of responsible officials of the Company, they promptly, on June 15, 1937, instructed those employees most active in the Brotherhood to cease all solicitation within the plant and to refrain at all times and places from representing that the Company was supporting the Brotherhood or had anything to do with it; that respondent instructed its plant superintendents and other supervisory employees that no activity on behalf of the Brotherhood should take place within the plant; and that such instructions were carried out by all persons within the control of respondent.

Upon a rehearing, the respondent will offer evidence to prove these facts.

[fol. 12-25]

VI

The Ford Service Department and Other Groups of Ford Employees

Paragraph 1(c) of the order herein is without support in the evidence and is based upon a misapprehension of the facts. The Board's purported finding (p. 55) that "the record leaves no doubt that the Service Department has been vested with the responsibility of maintaining surveillance over Ford employees, not only during their work but even when they are outside the plant, and of crushing at its inception, by force if necessary, any sign of union activity", is unsupported by the evidence and contrary to the fact, as is the finding that its membership has been greatly enlarged (p. 22).

The function of the Service Department is to guard and patrol the gates and the plant for the purpose of preserving order, preventing thefts, keeping out trespassers, and the

like. During 1936, this department averaged a personnel of approximately 300 men, and did not at any time during 1937 exceed 400 men. As appears upon the face of the report, the grounds of the respondent's River Rouge plant covered over 1,096 acres and the buildings have a floor area of over 7,250,000 square feet. As appears upon the face of the report, said plant gives employment to more than 80,000 men. It is respectfully submitted that a force of from 300 to 400 men to patrol and police what is the equivalent to a city with a popultaion of nearly 100,000 people is not an excessive force for the legitimate purposes for which said Service Department is maintained. The Service Department performs only such duties outside the plant grounds as are necessary to the protection of the plant, and the purported conclusion of the Board that this department is "vested with the responsibility of maintaining surveillance over Ford employees not only during their work but even [fol. 12-26] when they are outside the plant" is contrary to the fact.

The Board has further referred to "vigilante" groups. The respondent is informed that the only groups of employees that could possibly conform to this description were groups that informally joined together for the sole purpose of resisting any attempt to inaugurate a sit-down strike inside the plant.

Upon rehearing the respondent is prepared to offer proof of the foregoing facts.

VII

Discharges

In a plant employing 80,000 men, the Board has found that over a period of 8 months 29 men were discharged for being members of a union. The smallness of the number (1 to every 2,500) is itself eloquent that the Company does not in fact follow a policy of discriminating against union members.

And as to most of the 29 men found by the Board to have been discharged as a part of an alleged policy of discrimination against unions, but two witnesses appeared—the man himself and his foreman. The Supreme Court of the United States, in its decision in Labor Board v. Jones & Laughlin, 301 U. S. 1, at page 45, said:

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right to discharge when that right is exercised for other reasons than such intimidation and coercion."

[fol. 12-27] It is respectfully submitted that the Board is not justified in making its findings upon the unsupported evidence of the men discharged, particularly in the light of the policy of the Company as hereinbefore reviewed and as embodied in the statement of Mr. Ford introduced in evidence by counsel for the Board itself. Upon rehearing, the respondent will offer further proof (1) in corroboration of the foremen; (2) that the number of employees which the Company is charged with having discharged for union activities or sympathies represented but a small fraction of the total number of employees discharged within the same period, and (3) that within the knowledge of the Company and its responsible officials, there were, at the time such discharges took place, many employees of the respondent who were members of labor unions, who had been employees of the Company for many years, who are still in its employ and whose service of employment has never been interfered with by reason of such membership.

VIII

Absence of a Fair Hearing and Due Process

Section 10(c) of the National Labor Relations Act requires the Board to make findings of fact. Section 32 of the Rules and Regulations of the Board provides for the preparation of an intermediate report by the trial examiner which "shall contain (a) findings of fact, separately stated and numbered, and (b) recommendations as to what disposition of the case should be made," and for the service of said intermediate report upon the respondent. Section 34 provides for the filing of exceptions to said intermediate report. The Rules and Regulations further contemplate, as they must, briefs and oral argument upon said exceptions.

No intermediate report was ever served upon the respond-

ent in this case, and no opportunity to except thereto af-
[fol. 12-28] forded. No briefs or oral argument were received by the Board. The decision and the order of the Board contain no findings of fact within the meaning of the Act and, therefore, the order is without support in law.

By reason of the foregoing, the respondent has been denied a fair hearing both within the meaning of the statute and in violation of the Fifth Amendment to the Constitution of the United States.

Wherefore, respondent respectfully prays that the Board vacate and set aside its decision and order herein and grant a rehearing hereof, and pending such rehearing, grant a stay of the order entered herein.

Respectfully submitted, Louis J. Colombo, Attorney for the Respondent Ford Motor Company. Frederick H. Wood, Wm. D. Whitney, Henry G. Walter, Jr., Harmon Duncombe, of Counsel.

January 3, 1938.

[fol. 12-29] EXHIBIT "B" TO ANSWER

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-199

In the Matter of FORD MOTOR COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA

RETURN OF RESPONDENT FORD MOTOR COMPANY TO PARAGRAPH 2(e)

Now comes Ford Motor Company (hereinafter called the respondent), and reserving to itself all exceptions and objections to the jurisdiction of the Board in the above-entitled matter and to the validity of its decision and order herein upon constitutional grounds, upon the ground that in making the same the Board exceeded its statutory authority, upon the ground that in the making of said decision and order it failed to follow the procedure laid down in the Act, upon the ground that its purported findings of fact are unsupported by substantial evidence and contrary to the

weight of the evidence, and are insufficient to support the order made, and upon any and all other grounds whatsoever, makes and files with the Regional Director of the Seventh Region the following return to the decision and order herein in response to paragraph 2(c) of such order;

[fol. 12-30] Paragraph 1(a). The respondent has never discouraged membership in International Union, United Automobile Workers of America, or any other labor organization of its employees by discharging or refusing to reinstate any of its employees by reason of membership therein, or in any other manner discriminated in regard to their hire or tenure of employment or any term or condition of employment, because of membership in such organization, or on account of activity in behalf of or sympathy toward any such organization, contrary to Section 8(3) of the National Labor Relations Act, and the respondent has no intention of so doing in the future. The respondent, nevertheless, protests that paragraph 1(a) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence.

Paragraph 1(b). The respondent has never dominated or interfered with the formation or administration of Ford Brotherhood of America, Inc., or of any other labor organization of its employees, or contributed financial or other support thereto, and has no intention of so doing in the future. The respondent, nevertheless, protests that paragraph 1(b) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence.

Paragraph 1(c). The respondent has never organized, maintained, supported or assisted "vigilante" or similar groups, or employed or used such groups, the members of its Service Department, or any other persons, directly or indirectly, for the purpose of intimidating or coercing its employees from joining International Union, United Automobile Workers of America, or any other labor organization of its employees, and has no intention of so doing in the future. The respondent, nevertheless, protests that para- [fol. 12-31] graph 1(c) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence.

Paragraph 1(d). The respondent has never threatened, assaulted, beaten, or in any other manner interfered with,

restrained or intimidated, directly or indirectly, members of International Union, United Automobile Workers of America, or any other labor organization of its employees distributing or otherwise disseminating union literature in the vicinity of its River Rouge plant, and has no intention of so doing in the future. The respondent, nevertheless, protests that paragraph 1(d) of the order herein to cease and desist from such practices is unjustified by the facts and unsupported by evidence. Moreover, the respondent asserts its lawful right to prevent entry of undesirable persons upon its plant grounds and to eject trespassers from its plant or its plant grounds, to maintain law and order therein, and by all lawful means to protect the rights of itself and its employees from attack.

Paragraph 1(e). This paragraph appears to be predicated upon the views of Mr. Henry Ford as expressed in his statements which were disseminated by the respondent among its employees and were reviewed in the decision. Such review in the decision of the Board is incomplete and consequently unfair. It therein appears that Mr. Ford is of the opinion that the employees of the respondent are better off outside a union than in one—an opinion which would seem to be justified by the history of the well-being of the employees of the respondent, which has always been a pioneer in the payment of high wages and the improvement of working conditions. Whether this is so or not, which is not for the Board to determine, Mr. Ford in so expressing himself was exercising the right of free speech guaranteed [fol. 12-32] by the Constitution of the United States, with which the Board has no authority to interfere, as it has attempted to do in its order. At the same time, the respondent and its founder have recognized the right of every employee to join a union or not, as he pleases. The respondent, therefore, respectfully advises the Board that it will not comply with paragraph 1(e) of its order herein.

Paragraph 1(f). The respondent is advised by counsel that paragraph 1(f) of the order is a restatement of the provisions of Section 8(1) of the Act. The respondent has never interfered with, restrained or coerced its employees in violation of said Section 8(1) and has no intention of so doing. The respondent, nevertheless, protests that para-

graph 1(f) of the order is unjustified by the facts and unsupported by evidence and, being a restatement of Section 8(1) of the Act, exceeds in scope any order that the Board may lawfully enter on the basis of its purported findings, its conclusions of law or the record in the proceeding.

Paragraphs 2(a) and 2(b). The respondent respectfully advises the Board that it will not comply with paragraphs 2(a) and 2(b) of the order herein for the reasons that they are unjustified by the facts and unsupported by evidence, and that in the entry of the same the Board exceeded both its constitutional and its statutory authority.

Paragraphs 2(c) and 2(d). Although it is the intention of the respondent, as hereinbefore set forth, to obey in the future, as it has in the past, the provisions of the National Labor Relations Act upon which the decision and order purport to be based, it respectfully advises the Board that it will not post any notices, in compliance with paragraphs [fol. 12-33] 2(c) and 2(d) of the order herein for the reasons that said paragraphs are unjustified by the facts and unsupported by the evidence, that respondent has not in the past been guilty of any violations of the provisions of the National Labor Relations Act, and that in making said paragraphs of its order the Board exceeded both its constitutional and its statutory authority.

Paragraph 2(e). The foregoing constitutes the response of the Ford Motor Company to paragraph 2(e) of the decision and order herein.

January —, 1938.

Ford Motor Company, by P. E. Martin, Vice-President.

[fol. 13] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

NOTICE OF MOTION—Filed May 2, 1938

To Messrs. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

SIRS:

Please Take Notice that the annexed verified motion for leave to withdraw petition for enforcement and transcript of record without prejudice, and proposed order thereon, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit, at the Federal Building in the City of Covington, Kentucky, on the 3rd of May 1938, at 10:00 o'clock (Eastern Standard Time) in the forenoon of that day, or as soon thereafter as counsel can be heard.

Charles Fahy, General Counsel, National Labor Relations Board.

Dated, April 29, 1938.

Receipt of the within notice, together with two copies of the annexed motion, on the 29th day of April 1938, is hereby acknowledged.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, by Douglas L. Hatch, Attorneys for Ford Motor Company.

[fol. 14] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

MOTION FOR LEAVE TO WITHDRAW PETITION FOR ENFORCEMENT AND TRANSCRIPT OF RECORD WITHOUT PREJUDICE—Filed May 2, 1938

Now comes the National Labor Relations Board, petitioner in the above-entitled cause, by its attorney, and moves this Court for leave to withdraw its petition for enforcement and the transcript of the record herein, without prejudice, and in support of its motion respectfully shows as follows:

1. On December 22, 1937, pursuant to Section 10(c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166) and to Section 38(b) of Article II of the Board's Rules and Regulations, the National Labor Relations Board issued its decision and order (R. 2094-2161) in the proceeding entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," known upon the Board's files as Case No. C-199. Thereafter, on January 7, 1938, pursuant to Section 10(e) of the Act, the Board filed in this Court its petition for enforcement of its order and a certified transcript of the record of the said proceeding before the Board, including a copy of the Board's decision and order (R. 1).

2. On April 11, 1938, Ford Motor Company, respondent [fol. 15] herein, filed with this Court its answer to the Board's petition for enforcement, alleging, inter alia, that the Board's order was void and contrary to the Fifth Amendment in that the respondent was never accorded by the Board an opportunity to inspect proposed findings by the Board, or to except thereto, or to urge that such findings were not in accordance with the evidence, and, upon information and belief, that the Board's decision and order were made by subordinates and that neither the Board nor any member thereof judicially weighed or appraised the evidence. On the same date, the respondent filed a motion, based upon Morgan v. United States, 298 U. S. 468, for an order requiring the Board to reply to the above allegations set forth

in respondent's answer. On April 15, 1938, the Court entered an order passing this motion of respondent to the hearing, and on April 18, 1938, the Court assigned the cause for hearing on May 9, 1938. Thereafter, on or about April 27, 1938, the respondent filed in this Court a petition, based upon the decision of the Supreme Court in the second Morgan case (Morgan v. United States, decided April 25, 1938, No. 581), for commission to take depositions of Board members and subordinates who could give testimony material to the allegations contained in respondent's answer, and for a continuance of the hearing of the cause pending the taking of such depositions.

3. In the supervening decision of the Supreme Court in the second Morgan case, a rate-fixing order of the Secretary of Agriculture was held void for lack of the "full hearing" required by the Packers and Stockyards Act (42 Stat. 159; 7 U. S. C. §§ 181-229), where the order was based upon the Secretary's ex parte "reactions" to the findings of subordinates in the Bureau of Animal Industry, whose representatives had conducted the proceedings by the Government, where no complaint had initiated the proceeding, and where, although they requested proposed findings and argument thereon, the appellants were neither fairly advised of the Government's claims nor afforded a fair opportunity to be [fol. 16] heard upon the Government's concrete proposals. A copy of the Supreme Court's opinion is annexed as Exhibit A to the respondent's petition for a commission.

4. The Board makes the motion herein without conceding in any respect that the supervening decision of the Supreme Court in the Morgan case would apply to the Board's procedure in the case herein under the Act and the Rules and Regulations of the Board, or that any such question is properly presented for consideration by the Court. The purpose of this motion is to eliminate certain issues as to the validity of the Board's procedure in this case. Should the motion be granted, the Board will then set aside its order, pursuant to Section 10(d) of the Act, issue proposed findings to which the parties will be permitted to file exceptions and if they so desire argue objections before the Board, and thereafter make its decision and order, or take such further or other action as may be deemed advisable. In this manner questions concerning the validity of the Board's procedure will

be obviated on the transcript of record, if one is later certified to the Court. The respondent will not be prejudiced in any way. Indeed, the opportunity to file exceptions to proposed findings and to urge objections thereto before the Board is the very opportunity which in its answer the respondent complains it was denied.

5. The respondent has not asked for affirmative relief against the Board and may not do so under the Act. Therefore, since withdrawal of the petition will in no way prejudice the respondent, the Board has an absolute right to such withdrawal without prejudice to the filing of a new petition. Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93 and authorities there cited; Jones v. Securities & Exchange Commission, 298 U. S. 1, 19-20.

Wherefore the Board, by its attorney, prays that this motion forthwith be granted.

Charles Fahy, General Counsel, National Labor Relations Board.

Dated April 29, 1938, Washington, D. C.

[fol. 17] *Duly sworn to by Charles Fahy. Jurat omitted in printing.*

[fol. 18] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919, No. 8019

[Title omitted]

NOTICE OF MOTION TO CONSOLIDATE CAUSES—Filed May 4, 1938

To Charles Fahy, Counsel for National Labor Relations Board, Shoreham Building, Washington, D. C.

Please Take Notice that on the 9th day of May, 1938, at 9:00 A. M. (E. S. T.), or as soon thereafter as counsel can be heard, the annexed motion and proposed order thereon to consolidate the above-entitled causes will be presented to

the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Dated May 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine and Wood, Attorneys for Respondent-Petitioner, Ford Motor Company.

Due service acknowledged this — day of May, 1938.

—— ——, Attorney for National Labor Relations Board.

[fol. 19] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919, No. 8019

[Title omitted]

MOTION TO CONSOLIDATE CAUSES—Filed May 4, 1938

Comes now Ford Motor Company, respondent in the first above-entitled cause and petitioner in the second above-entitled cause (hereinafter called the Company), and respectfully shows to the Court as follows:

1. On January 7, 1938, pursuant to Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166), the National Labor Relations Board (hereinafter called the Board) filed with this Court in the first above-entitled cause its petition for the enforcement of a purported order of the Board.

2. On May 4, 1938, pursuant to Section 10(f) of said Act, the Company filed with this Court in the second above-entitled cause its petition for a review of and to set aside a purported order of the Board.

[fol. 20] 3. The purported order referred to in paragraph 1 hereof and the purported order referred to in paragraph 2 hereof are the same order, which order was purported to be made and entered on December 22, 1937, in a proceeding known upon the records of the Board as Case No. C-199, the title thereof being "In the Matter of Ford Motor Com-

pany and International Union, United Automobile Workers of America", and was directed to the Company.

4. Paragraph 10(f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. § 160) provides that in the event that any person aggrieved by a final order of the Board shall seek a review of such order in a Circuit Court of Appeals of the United States, a copy of the petition seeking such review shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the Court a transcript of the entire record in the proceeding, certified by the Board. The transcript of record thus required to be certified by the Board and filed in the second above-entitled cause has already been certified by the Board and filed with this Court in the first above-entitled cause.

5. On April 4, 1938, the Company filed with this Court in the first above-entitled cause its petition for leave to adduce additional evidence. The allegations and prayer of said petition are equally applicable to the second above-entitled cause.

6. On April 27, 1938, the Company filed with this Court in the first above-entitled cause its petition for a commission to take depositions of witnesses. The allegations and prayer of said petition are equally applicable to the second above-entitled cause.

7. On May 2, 1938, the Company filed with this Court and served upon the Board interrogatories in the first above-
[fol. 21] entitled action. Said interrogatories are equally applicable to the second above-entitled cause.

8. Both of the above-entitled causes present to the Court for determination the same issues of fact and law, and the consolidation thereof will avoid unnecessary costs and delay and will be reasonable.

9. On April 29, 1938, the Board served upon counsel for the Company notice of a motion in the first above-entitled cause for leave to withdraw without prejudice its petition to enforce its purported order and the transcript of record filed in said cause with this Court. The Company believes that the Board is not entitled to the relief so requested and will resist the Board's motion. In order that there may be no doubt that the Company is entitled to have the Court pass upon its request that the Board's purported order

be set aside, the Company has, as stated in paragraph 1 hereof, filed in the second above-entitled cause its petition to set aside the order of the Board.

Wherefore, pursuant to Revised Statutes § 921 (28 U. S. C. § 734), the Company respectfully moves this Court for an order directing that the above-entitled causes be consolidated, that the transcript of record filed in the first-above-entitled cause be deemed to be filed in the consolidated cause, and that said petition for leave to adduce additional evidence, said petition for a commission to take depositions of witnesses and said interrogatories be deemed to be filed also in the consolidated cause, and for such other and [fol. 22] further relief as may be just and proper.

Dated May 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent-Petitioner, Ford Motor Company.

[fol. 23] *Duly sworn to by Frederick H. Wood. Jurat omitted in printing.*

[fol. 24] [File endorsement omitted]

[fol. 24-1] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

[Title omitted]

MEMORANDUM IN OPPOSITION TO MOTION OF NATIONAL LABOR RELATIONS BOARD FOR LEAVE TO WITHDRAW WITHOUT PREJUDICE ITS PETITION FOR ENFORCEMENT AND TO ALSO WITHDRAW TRANSCRIPT OF RECORD—Filed May 5, 1938

The Board has moved to withdraw its petition for enforcement of its order against respondent and to also withdraw the certified transcript of the record in the proceedings before it now on file in this Court. While under certain circumstances (not here existent) and when authorized by statute or an appropriate rule of Court, a plaintiff may move for the dismissal of his case, without prejudice, we know of no case which holds that a plaintiff may "with-

draw" a petition once filed or a suit once instituted. Equally unprecedented is the Board's motion to withdraw the transcript of the proceedings before it, a part of the permanent records of this Court.

I

The Board's Motion to Withdraw its Petition Should be Denied.

1. The Board is not entitled, as of right, to withdraw its petition.

The proceeding now before the Court is statutory. The Act provides that upon the entry of an order by the Board [fol. 24-2] either the Board [Sec. 10(e)] or "any person aggrieved" by such order [Sec. 10(f)] may obtain a judicial review thereof by a Circuit Court of Appeals of appropriate territorial jurisdiction. If the Board is the moving party, the jurisdiction of the Court is invoked by the filing of a petition "for the enforcement of such order". If the respondent in the proceeding before the Board is the moving party, the jurisdiction of the Court is invoked by filing a petition "praying that the order of the Board be modified or set aside". In either event the jurisdiction and powers of the Court are the same [Secs. 10(e) and (f)] and are defined by Secs. 10(e) and 10(f) of the Act. In either event the power of the Court is limited to the entry of "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board". No answer is required.

Thus, under the procedure provided by the Act, whenever either party to the proceeding before the Board invokes the jurisdiction of the Court, the other party, without answer, is entitled as a matter of right to affirmative relief if justified by the record before the Court. Had the jurisdiction of the Court been first invoked by the respondent in this case through the filing of a petition "praying that the order of the Board be modified or set aside" and should the Court be of the opinion that the order was valid, its decree would not be one of dismissal but it would be compelled under Sec. 10(e) of the Act to enter an affirmative decree enforcing the order, and the Board would have the right to insist upon the entry of such decree. Conversely, when the Board invokes the jurisdiction of the Court by

a petition "for the enforcement" of an order, if the Court, after hearing, reaches the conclusion that the order of the Board is invalid, the respondent is entitled, not merely to a decree of dismissal, but to the entry of an affirmative decree setting the order aside. This the Act accords to respondent as a matter of right, without the filing of a cross-petition. The case stands as though it had itself [fol.24-3] invoked the jurisdiction of the Court by filing a petition to set the order aside.

The Act on its face thus requires the entry of an affirmative decree granting relief to whichever party is entitled to it, whether petitioner or respondent, and without answer by the latter. The Board in its motion (para. 5) in effect concedes that its motion is predicated wholly upon the lack of any right of the respondent in this proceeding to affirmative relief, saying:

"The respondent has not asked for affirmative relief against the Board and may not do so under the Act."

To this the Act as analyzed above affords a complete answer. By the mere filing of its petition the Board itself invoked the jurisdiction of the Court in a statutory proceeding providing specifically for affirmative relief to the respondent through the entry of a decree setting the order aside if, upon a determination of the issues, the Court should hold, as we think it will be required to hold, that the order is void. Moreover, on April 11th the respondent filed an answer in this proceeding, in which, after raising various issues of fact and law, many of which were put in issue, without answer, by the Board's own petition filed pursuant to the statutory procedure, it asked relief as follows:

"Wherefore, the respondent prays that the petition herein be denied and dismissed, and that the purported order of the Board be set aside and the proceeding remanded to the Board with directions to dismiss the complaint, and respondent prays for such other and further relief in the premises as may be just and proper."

Assimilating its motion to withdraw to the right of a plaintiff in an equity suit to a dismissal without prejudice, where no affirmative relief has been sought, the Board cites Ex parte Skinner v. Eddy Corp., 68 U. S. 93, and Jones v.

Securities & Exchange Commission, 298 U. S. 1, 19-20. [fol. 24-4] In Ex parte Skinner the Court specifically recognized (p. 94) that the plaintiff is not entitled to such a dismissal where affirmative relief is requested. See also Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138 (1898); Electric Accumulator Co. v. Brush Electric Company, 44 Fed. 602 (C. C., N. D., O., 1890); Hat-Swett Manufacturing Co. v. Waring Co., 46 Fed. 87 (C. C., S. D. N. Y., 1891); City of Detroit v. Detroit City Railway Co., 55 Fed. 569 (C. C., E. D., Mich., 1893).

Jones v. Securities & Exchange Commission, supra, involved the right of a person who had applied to the Commission for authority to sell securities to withdraw such application. In that case the applicant was seeking to do an act, i.e., sell securities, which he could not lawfully do without the consent of the Commission. The Commission was without any authority in the first instance to compel him to offer such securities for sale and acquired no authority so to do by the filing of his application. There was thus no affirmative action which it could take in the premises. The Court held that if the applicant chose to abandon the enterprise, on which he had sought to embark, by withdrawing his application to obtain the consent of the Commission to engage therein, he had a right to do so. Moreover, both the majority and dissenting opinions in that case recognized that the question turned upon presence or absence of authority in the Commission to take some affirmative action against him, although disagreeing as to whether it had the authority or not. The case is not in point and to the extent that it might be regarded as in point, stands only for the proposition that a party may dismiss a proceeding once begun if, under the issues presented, the other party, if successful, would be entitled only to a dismissal and not to affirmative relief.

The proceeding now pending before the Board is, as we have said, statutory. It is governed by the Act. The kind of a decree which the Court may enter is defined by the statute. The Court must either enter a decree enforcing, modifying and enforcing as modified or setting [fol. 24-5] aside the order in whole or in part. Whether the Court's jurisdiction be invoked by the Board in a petition to enforce or by the respondent in the proceedings before the Board by a petition to set aside, the decree is affirmative in form and effect. The statute thus provides

that in a proceeding such as this, the respondent, whether the Board or the employer, if successful, is entitled not merely to a decree of dismissal as in an ordinary equity suit where no affirmative relief is sought, but to an affirmative decree in its favor.

The proceeding being statutory, the rights of the parties are governed by the statute. The jurisdiction of the Court having been once invoked by either party, the other party is entitled to a determination of the issues and to the entry of a decree conforming in all respects to that which would be entered if it had been the moving party. Had the respondent invoked the jurisdiction of the Court by bringing a petition to set the Board's order aside, no one would contend that the proceeding could be withdrawn or discontinued on the motion of the Board. Under the plain wording of the statute, the Board, having invoked the jurisdiction of the Court by a petition to enforce, has put the respondent in the same position in which it would have been placed had it been the moving party, viz., in a position to assert as a matter of right that a decree setting the order aside be entered, if upon a determination of the issues the Court should be of the opinion that the order is invalid. This being so, the Board's petition may not be dismissed without the consent of the respondent, any more than a petition of the respondent to set the order aside could be dismissed without the consent of the Board.

It follows, we think, that the Board is not only not entitled as of right to have its motion to withdraw granted, but the Court is without power to grant it. This conclusion, we think, follows irrespective of whether, if this were an ordinary suit in equity, the petitioner would be [fol. 24-6] entitled to a withdrawal or discontinuance of its suit on its own motion or not.

If, however, it should be held, erroneously, as we believe, that the general rules governing the right of a plaintiff in an equity suit to a dismissal without prejudice, where no affirmative relief has been sought by the defendant, are applicable, the Board is not entitled to such a dismissal on the authorities cited in its own motion and others.

2. The motion, if addressed to the discretion of the Court, should be denied.

If despite the arguments hereinbefore advanced the Court is of the opinion that the motion is one addressed to its

discretion, it should be denied. On April 11th the respondent filed an answer to the Board's petition to enforce and moved for an order compelling a reply to certain affirmative allegations therein contained.

Among other things, the answer alleges (para. 12-16) that the conduct of the Trial Examiner was such as to constitute a denial to the respondent in the proceedings before the Board, as conducted by it through its Trial Examiner, of that full, fair and open hearing required by the Act and guaranteed by the due process clause in the Fifth Amendment to the Constitution of the United States. The answer also alleges in substance (para. 25-46) that the Board in its conduct of the proceedings before it failed to adhere to those "rudimentary requirements of fair play" essential to be observed by it. Morgan v. United States, 298 U. S. 468; Morgan v. United States, on second appeal, October Term, 1937, No. 581, U. S. Supreme Court, decided April 25, 1938. The answer also alleges (par. 11) that the order "and each and every part thereof is invalid" because the Board's purported findings "are, in material and controlling respects, not supported by evidence." The intended purpose and effect of paragraph [fol. 24-7] 1(e) of the order is to preclude Mr. Ford from stating his views in respect of unions, and of the advantages or disadvantages of joining the same by the employees of the respondent. It is the contention of the respondent that this paragraph of the order violates the guaranty of free speech contained in the First Amendment to the Constitution of the United States. This issue was automatically submitted by the Board for the determination of this Court by the filing of its petition to enforce with the transcript of the proceedings before it. It is specifically raised in the respondent's answer (par. 59). The answer raises other legal defects in the order, which, if existent, are incapable of being cured. Moreover, it is the contention of the respondent that the decision and order of the Board is invalid because based throughout upon a misconception of the rules of law to be applied and of its duties and powers under the Act. This again is an issue which the Board automatically and voluntarily submitted to the jurisdiction of this Court for determination when it filed its petition to enforce.

All of the issues raised by the proceeding now pending are of public importance. Consequently, their determina-

tion by this Court may not be avoided because one party to the suit desires to withdraw from the litigation and avoid their determination. Southern Pacific Company v. I. C. C., 219 U. S. 433, 452; Southern Pacific Terminal Company v. I. C. C., 219 U. S. 498.

On April 27th, upon the coming down of the second decision in the Morgan case, the respondent moved the Court for a commission to take depositions of the members of the Board and its staff on the issues thus raised by its answer. On May 2nd respondent served upon the Board its interrogatories addressed to the same issue, copies of which have been lodged in this Court. On May 2nd after such interrogatories had been served the Board filed its motion to withdraw, notice of which had been served upon the respondent's counsel on April 29th. The Board has [fol. 24-8] filed no reply to the affirmative allegations of the respondent's answer. In its motion it says (Paragraph 4):

"The Board makes the motion herein without conceding in any respect that the supervening decision of the Supreme Court in the Morgan case would apply to the Board's procedure in the case herein under the Act and the Rules and Regulations of the Board, or that any such question is properly presented for consideration by the Court. The purpose of this motion is to eliminate certain issues as to the validity of the Board's procedure in this case. Should the motion be granted, the Board will then set aside its order, pursuant to Section 10(d) of the Act, issue proposed findings to which the parties will be permitted to file exceptions and if they so desire, argue objections before the Board, and thereafter make its decision and order, or take such further or other action as may be deemed advisable. In this manner questions concerning the validity of the Board's procedure will be obviated on the transcript of record, if one is later certified to the Court."

It is obvious that the primary purpose of the motion is to avoid examination of the members of the Board and its staff on the issue raised by the answer and to avoid answering the interrogatories propounded. Its secondary purpose is to patch up its record by going through the form of itself setting aside its order as a matter of grace, serving proposed findings to which the respondent may then have an opportunity to except and then entering its order over

again. It is not without significance that the procedure which the Board states it will follow if its motion should be granted does not include the reopening of the case for the taking of further testimony as requested by the respondent in a petition for rehearing filed by it after the issuance of the Board's order, denied by the Board the next day, and renewed in the respondent's petition for leave to adduce additional testimony now pending before this Court. The Board in its motion states that, if granted, the parties may [fol. 24-9] "if they so desire argue objections before the Board," but does not indicate any desire upon its part to hear such arguments. In its first opinion in the Morgan case, decided May 25, 1936, the Court said:

"The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The Board was thus warned more than eighteen months before it entered its decision and order in the present proceeding that it must, as said in the Court's second opinion in the Morgan case, accord to respondents in proceedings before it "the rudimentary requirements of fair play." Its motion is a virtual confession that it has not done so. Without confessing its failure so to do, it asks leave to withdraw its suit, pick the proceedings up at such point as it sees fit, go through the form of reconsidering a case already prejudged, and having thus patched up its record in this and perhaps other respects, come back to this Court with a new order asserting that it has now accorded to the respondent the rudimentary requirements of fair play. Assuming the motion to be addressed to the discretion of the Court—as we respectfully say it cannot be—the Board should not be permitted to withdraw or dismiss its petition for any such purpose.

II

The Motion to Withdraw the Certified Transcript of the Proceedings Before the Board Should Be Denied

Equally without precedent is the Board's motion to withdraw the certified copy of the transcript of record before [fol. 24-10] it, heretofore filed by it with the Court as required by Section 10(e) of the Act. This certified transcript is a part of the permanent records of this Court, being made so by the Act itself. Even assuming the right of the Board to withdraw its petition, the existence of this right would not carry with it the right to physically withdraw the transcript of record any more than it would carry with it the right physically to withdraw its petition to enforce. Moreover, the respondent would be seriously prejudiced by such withdrawal, even though the Board's motion to withdraw or dismiss its suit should be granted. An order of dismissal is a final judgment from which appeal or certiorari lies. Wilson v. Republic Iron & Steel Co., 257 U. S. 92 (1921); Seiber Lumber Co. v. Erkhart, 247 Fed. 284 (5 C. C. A., 1918); Iowa-Nebraska Light & Power Co. v. Daniels, 63 Fed. (2d) 332 (8 C. C. A., 1933); Massachusetts Fire & Marine Ins. Co. v. Schmick, 58 Fed. (2nd) 830 (8 C. C. A., 1932). By Section 10(e) of the Act the judgment of this Court in any proceeding instituted thereunder is reviewable by the Supreme Court of the United States on certiorari. Moreover, if the orders sought to be entered upon the Board's motion be regarded as interlocutory and not final, it may be reviewed by the Supreme Court on certiorari. Gay v. Ruff, 292 U. S. 25 (1934); United States v. Gulf Refining Company, 268 U. S. 542 (1925); Forsyth v. Hammond, 166 U. S. 506 (1896). The rules of the Supreme Court require that every petition for certiorari shall be accompanied by a certified copy of the record in the Court to which the writ is sought (Rule 38). By seeking to withdraw the certified copy of the record in the proceedings before the Board from the files of this Court, the Board would thus endeavor to prevent the respondent from seeking a review by certiorari of any order or decree entered by this Court permitting a withdrawal or dismissal of the Board's petition without prejudice.

[fol. 24-11] Since the Board in its motion—erroneously, as we believe—asserts that respondent is not entitled to

atmrmative relief in the proceeding now pending, respondent as a matter of precaution on May 4th filed in this Court a petition praying that the order of the Board be set aside, accompanied by a motion to consolidate the proceeding thus instituted, with that instituted by the Board. The Act expressly accords to the respondent [Section 10(f)] the right to institute such a suit, which when instituted, cannot be dismissed at the instance of the Board, and upon the institution of which it becomes the duty of the Court to determine the issues presented, and at the conclusion of the case, enter a decree in behalf of the petitioner, setting the order aside, or, if the issues should be determined in favor of the Board, a decree enforcing its order. The respondent is of right entitled to the determination of these issues by this Court in the petition filed by it, whatever disposition be made of the Board's motion. The Act further requires, however, that upon the filing of such a petition a transcript of the entire record before the Board be filed. This transcript must be certified by the Board. Such certified transcript is now on file in this Court. The respondent as petitioner in its own suit has asked that it be deemed filed in that case. This is an appropriate request. If not, and the motion of the Board to withdraw its own suit be granted, the same should be conditioned upon either (1) an order directing that the transcript now on file in this case be deemed forthwith to have been filed in the respondent's cross-suit, or (2) upon an order directing the Board to provide the respondent forthwith with a certified copy of the record before the Board and enjoining the Board from taking any further action until five days after said certified transcript has been furnished to respondent.

The Court should not by permitting a withdrawal of the Board's case and the transcript of the proceedings before it, deprive the petitioner of its statutory right to invoke [fol. 24-12] the jurisdiction of this Court for the purpose of determining the validity of the Board's order on all issues pertinent thereto.

It is respectfully submitted that the Board's motion should in all respects be denied.

Dated May 4, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent, Ford Motor Company.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO WITHDRAW WITHOUT PREJUDICE

A motion having been filed herein by the National Labor Relations Board for leave to withdraw its petition for enforcement and the transcript of record filed herein on or about January 7, 1938, without prejudice;

Upon consideration thereof it is hereby

Ordered by this Court that the said motion of the National Labor Relations Board be and hereby is granted.

Approved for entry.

(Signed) Xen Hicks, Circuit Judge.

Entered May 5, 1938.

[fol. 26] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919, No. 8019

[Title omitted]

OPPOSITION TO MOTION TO CONSOLIDATE CAUSES AND TO MOTION TO COMPEL CERTIFICATION OF TRANSCRIPT OF RECORD AND FOR A TEMPORARY INJUNCTION—Filed May 9, 1938

Comes now the National Labor Relations Board, petitioner in the first above-entitled cause and respondent in the second above-entitled cause, by its attorney, and in opposition to the motions of Ford Motor Company (hereinafter called the Company) for an order directing that the above-entitled causes be consolidated and that the transcript of record and other papers filed in the first above-entitled cause be deemed to be filed in the consolidated causes, and for an order directing that the transcript of record filed in the first above-entitled cause, or, in the

alternative, that the Board provide the Company with a certified transcript of the record and that the Board [fol. 27] be enjoined from taking any action whatsoever until 5 days thereafter, respectfully shows as follows:

1. On January 7, 1938, pursuant to Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166), the National Labor Relations Board filed in this Court its petition for enforcement of its order issued against the Company on December 2[illegible] 1937, in the proceeding known upon the Board's files as Case No. C-199 and entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," and also filed in this Court a certified transcript of the record of such proceeding before the Board.

2. On May 2, 1938, pursuant to notice, the Board filed in this Court a motion for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the transcript of record, for the purpose of vacating and setting aside its order and of having further proceedings before the Board.

3. On May 4, 1938, the Company filed in this Court a petition to review and set aside the said order of the Board issued December 22, 1937. No transcript of the record has been certified or filed in this Court upon the Company's said petition for review.

4. On May 5, 1938, the Court issued an order granting the said motion of the Board for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the certified transcript of record filed in the Court on January 7, 1938.

5. The Board having with leave of Court thus withdrawn its petition for enforcement and the transcript of the record, for the purpose of having further proceedings before the Board, the Board will issue, on May 10, 1938, [fol. 28] in the absence of unforeseen contingencies, an order vacating and setting aside its findings and order of December 22, 1937, and to that end on May 6, 1938, the Board caused to be served upon the attorneys for the Company a notice that on May 10, 1938, unless sufficient cause to the con-

trary shall then appear, the Board will vacate and set aside its said findings and order for the purpose of having further proceedings before the Board.

6. Upon the setting aside of the Board's findings and order of December 22, 1937, the above-entitled causes will be moot. Consequently, pending notification of the Board's action on May 10, 1938, the Court should not grant the Company's motions herein.

7. The Company's petition of May 4, 1938, for review of the Board's order of December 22, 1937, raises the identical issues raised by the Board's petition of January 7, 1938, for enforcement of its said order, and it is apparent that the Company filed its petition for review only for the purpose of endeavoring to prevent further proceedings before the Board. Since the Company's petition for review is redundant and not contemplated by the Act, and since the purpose of the said petition is no longer able to be accomplished, by reason of the Court's order of May 5, 1938, granting the Board's motion of May 2, 1938, the said petition for review should be dismissed and the Company's motions herein should be denied.

Wherefore, the Board, by its attorney, prays that the Company's motions herein be denied forthwith, or, in the alternative, that the Court take no action with respect to the said motions pending notification of the Board's action on May 10, 1938.

Dated this — day of May, 1938, at Washington, D. C.

—— ——,
General Counsel,
National Labor Relations Board.

[fol. 29] *Duly sworn to by Charles Fahy. Jurat omitted in printing.*

[fol. 30] EXHIBIT "A" TO OPPOSITION

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-199

In the Matter of FORD MOTOR COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA

To Frederick H. Wood, Esquire, Messrs. Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company:

Notice

Please Take Notice that on Tuesday next, May 10, 1938, In the Matter of Ford Motor Company and International Union, United Automobile Workers of America, Case No. C-199, the National Labor Relations Board, unless sufficient cause to the contrary shall then appear, will vacate and set aside its findings and order in said case made December 22, 1937, for the purpose of further proceedings before the Board.

National Labor Relations Board, (Sgd.) by Nathan Witt, Secretary.

Receipt of the above notice acknowledged this 6th day of May, 1938.

(Sgd.) Frederick H. Wood, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

NATIONAL LABOR RELATIONS BOARD

vs.

FORD MOTOR COMPANY

Before Hicks, Simons and Allen, JJ.

It is now ordered by the court that the order heretofore entered in this cause on the 5th day of May, 1938 be

amended in-so-far as it permits the withdrawal of the certified transcript of record in this cause, and it is now ordered that the certified transcript of record be and remain in the files of this court.

Approved for entry.

(Signed) Xen Hicks, Circuit Judge.

Entered May 9, 1938.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

WITHDRAWAL OF PETITION—Filed June 2, 1938

Now comes the National Labor Relations Board and withdraws the petition for enforcement pursuant to an order of the court dated May 5, 1938.

National Labor Relations Board, by (Signed) Philip G. Phillips, Its Attorney.

[fol. 33] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

NOTICE OF MOTION—Filed June 4, 1938

Please Take Notice that the annexed motion to vacate an order made herein May 5, 1938, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building in the City of Covington, Kentucky, at nine o'clock, Eastern Standard Time, in the forenoon of that day, or as soon thereafter as it may be presented.

Dated June 2, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent, Ford Motor Company.

Receipt of the above notice, together with a copy of the annexed motion and of the order granting motion to vacate order is hereby acknowledged this 2nd day of June, 1938.

Robert B. Watts, Attorneys for National Labor Relations Board.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

MOTION TO VACATE ORDER—Filed June 4, 1938

Now comes Ford Motor Company, respondent in the above-entitled cause, by its attorneys, and moves this Court to vacate an order made herein May 5, 1938, granting the motion of National Labor Relations Board for leave to withdraw without prejudice the petition for enforcement of order and certified transcript of record filed herein on or about January 8, 1938, and for such other and different relief as may be just and proper.

Dated June 2, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent, Ford Motor Company.

[fol. 35] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

OPPOSITION TO MOTION TO VACATE ORDER—Filed June 6, 1938

Now comes the National Labor Relations Board, petitioner in the above-entitled cause, by its attorney, and in opposition to the motion of Ford Motor Company, respondent, to vacate the Court's order of May 5, 1938, granting

the Board's motion for leave to withdraw without prejudice the petition for enforcement and certified transcript of record filed herein on or about January 8, 1938, and for such other relief as may be just and proper, respectfully shows as follows:

1. As more fully appears in the Board's said motion for leave to withdraw, the Board had an absolute right to the withdrawal of its petition without prejudice. Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93 and authorities there cited; Jones v. Securities & Exchange Commission, 298 U. S. 1, 19-20.

2. Pursuant to the leave granted as of right by the Court on May 5, 1938, the Board on June 2, 1938, withdrew its petition, thus withdrawing the case and terminating the controversy.

3. The Court is without jurisdiction to grant the motion herein. There is no case in controversy and, in addition, no [fol. 36] certified transcript of the entire record is on file as required by Section 10(e) of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. II, § 160 (e)), since proceedings are pending before the Board and no final action has been had by the Board, as more fully appears in the Board's motion to vacate an order of the Court of May 9, 1938, in No. 8019. "Only upon the filing of a transcript exhibiting the Board's final action" do the Circuit Courts of Appeals have jurisdiction of petitions to enforce or review orders of the Board. In the Matter of the Petition of the National Labor Relations Board, decided by the Supreme Court, May 31, 1938.

4. The motion herein is unnecessary with respect to the certified transcript of record. By order of May 9, 1938, the Court modified its order of May 5, 1938, in regard to the withdrawal of the record. The record remains physically in the custody of the Court and is available for purposes of appeal if such should be sought by the Company.

Wherefore the Board, by its attorney, prays that the said motion be denied.

Robert Watts Acting General Counsel.

Dated, Washington, D. C., June 3, 1938.

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

FORD MOTOR COMPANY, Respondent.

Before Hicks, Simons and Allen, JJ.

ORDER ON MOTION TO VACATE ORDER—Filed June 10, 1938

In this cause it is Ordered—

(1) That the application of the petitioner filed June 2, 1938, to be permitted to withdraw its petition for enforcement is not again passed upon because the matter is fully covered by the order of the court filed May 5, 1938, and the amendatory order filed May 9, 1938.

(2) That the motion of respondent filed June 4, 1938, to vacate the court's order on May 5, 1938, is denied; but the withdrawal of the petitioner's petition for enforcement is stayed for thirty days from this date, pending application to the Supreme Court for a writ of certiorari, Provided that within such period the applicant shall file with the Clerk of this court a certificate of the Clerk of the Supreme Court that its certiorari petition, record and brief have been filed, the stay shall continue un final disposition by the Supreme Court.

(3) The application of respondent to be heard in oral argument upon the motions and matters herein determined is denied.

Approved for entry.

Xen Hicks, Circuit Judge.

[fol. 38] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 18, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, respondent hereby indicates the following portions of the record to be incorporated into a transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari and requests that such transcript and the transcript of record designated by the praecipe filed simultaneously herewith in case No. 8019 be consolidated physically and certified together and that such consolidated transcript be delivered to the undersigned, counsel for respondent.

1. Petition for the enforcement of an order of the National Labor Relations Board, filed January 7, 1938.

2. Answer of respondent to petition for the enforcement of an order of the National Labor Relations Board, filed April 11, 1938.

[fol. 39] 3. Motion of petitioner for leave to withdraw petition for enforcement and transcript of record without prejudice, filed May 2, 1938.

4. Order, dated May 5, 1938, granting motion of petitioner for leave to withdraw petition for enforcement and transcript of record.

5. Order, dated May 9, 1938, amending said order dated May 5, 1938.

6. Motion of respondent to vacate said order of May 5, 1938, filed June 4, 1938.

7. Petitioner's withdrawal of petition, filed June 2, 1938.

8. Order, dated June 10, 1938, refusing to pass upon withdrawal of petition filed June 2, 1938, denying motion to vacate order of May 5, 1938, providing for a stay, and denying application for oral argument.

9. This praecipe of respondent for transcript of record.

Dated, June 17, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Respondent.

Receipt of a copy of the above praecipe superseding a similar praecipe of even date hereby acknowledged this 17th day of June, 1938.

Robert B. Watts, Acting General Counsel, N. L. R. B.

[fol. 40] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 7919

[Title omitted]

PRAECIPE FOR ADDITIONAL PORTIONS FOR TRANSCRIPT OF RECORD—Filed June 24, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, petitioner hereby indicates the following additional portions of the record to be incorporated into the transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari.

1. Respondent's memorandum in opposition to motion of National Labor Relations Board for leave to withdraw without prejudice petition for enforcement and transcript of record, filed on or about May 4, 1938.

2. Motion of respondent to consolidate causes, filed May 4, 1938.

3. Opposition of petitioner to motion to consolidate causes, filed May 9, 1938.

4. Opposition of petitioner to motion to vacate order, filed June 5, 1938.

5. This praecipe of petitioner for additional portions for transcript of record.

Dated, June 22, 1938.

Robert B. Watts, Acting General Counsel National Labor Relations Board.

Receipt of a copy of the above praecipe hereby acknowledged this 22d day of June, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 41] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 7919

[Title omitted]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 24, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Respondent hereby requests that the following additional portions of the record be incorporated into the transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari:

1. Certificate of the National Labor Relations Board, filed January 7, 1938, omitting the documents annexed thereto.

2. Supplemental certificate of the National Labor Relations Board, filed January 10, 1938, omitting the document annexed thereto.

3. This supplemental praecipe.

Dated, June 23, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Respondent.

Receipt of a copy of the above praecipe on this 23rd day of June, 1938, is hereby acknowledged.

Robert B. Watts, Acting General Counsel, National Labor Relations Board, Petitioner.

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, OCTOBER TERM, 1937

No. 8019

FORD MOTOR COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A REVIEW OF AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed May 4, 1938

Comes now Ford Motor Company, the petitioner above named, and, pursuant to the provisions of an Act of Congress approved July 5, 1935 (49 Stat. 449, 29 U. S. C. §§ 151-166), known as the National Labor Relations Act (hereinafter called the Act), respectfully petitions this Honorable Court for a review of and to set aside a purported order purported to have been issued on December 22, 1937, by the National Labor Relations Board (hereinafter called the Board) in a proceeding instituted by the Board against petitioner. Said proceeding is known upon the records of the Board as Case No. C-199, the title thereof being "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America."

In support of this petition, petitioner respectfully shows:

1. Petitioner is, and at all times herein mentioned was, a corporation organized under and existing by virtue of the laws of the State of Delaware, and has and maintains an [fol. 44] office and place of business and transacts business in the City of Dearborn, State of Michigan.

2. By reason of the matters shown in paragraph 1 hereof, this Honorable Court has jurisdiction of this petition by virtue of the provisions of Section 10(f) of the Act.

3. On June 26, 1937, the Board issued and served upon petitioner a complaint in said Case No. C-199, charging that petitioner had engaged and was engaging in certain unfair labor practices affecting commerce within the meaning of the Act, and issued and served upon petitioner a notice of hearing. On July 3, 1937, petitioner duly filed with the Board its answer to said complaint.

4. Thereafter, from July 6 to July 30, 1937, the Board, by a Trial Examiner, held a purported hearing in said proceeding. At said hearing, the Board by its Examiner received testimony and other evidence. During said hearing amendments to the complaint were made and answers were filed thereto.

5. Thereafter, on August 3, 1937, the Board ordered that said proceeding be transferred to and continued before it.

6. Thereafter, on December 22, 1937, the Board purported to make and enter an order in said Case No. C-199, said purported order being as follows:

"Order

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Ford Motor Company, its officers, agents, successors and assigns shall:

"1. Cease and desist from:

"(a) Discouraging membership in International Union, United Automobile Workers of America or any other labor [fol. 45] organization of its employees by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of their membership in, activity in behalf of, or sympathy toward any such labor organization;

"(b) Dominating or interfering with the formation or administration of Ford Brotherhood of America, Inc., or any other labor organization of its employees, or con-

tributing financial or other support to any such labor organizations;

"(c) Organizing, maintaining, supporting or assisting vigilante or similar groups, or employing or using such groups, the members of its Service Department, or any other persons, directly or indirectly, for the purpose of intimidating or coercing its employees from joining International Union, United Automobile Workers of America or any other labor organization of its employees;

"(d) Threatening, assaulting, beating, or in any other manner interfering with, restraining, or intimidating, directly or indirectly, members of International Union, United Automobile Workers of America or any other labor organization of its employees distributing or otherwise disseminating union literature in the vicinity of its River Rouge plant;

"(e) Circulating, distributing or otherwise disseminating among its employees statements or propaganda disparaging or criticizing labor organizations or advising its employees not to join such organizations;

"(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer to George Onnela, Richard Weyhing, Clarence Fleming, Elmer Mackie, Thaddeus Radke, Alfred Onnela, Ray Onnela, Martin Jensen, Clifford Sheldon, John J. Dovey, Anthony J. Schipper, Fred Nygard, George B. Zubick, Joseph Gutierrez, John Barron, Joseph Sable, Alphonse Kuzulis, Homer King, Percy Llewellyn, Joseph Nierotko, George Smick, Joseph Galusky, Hector F. Manseau, Birtus C. Hall, Emil Tomkow, Joseph Bailey, John Cwikiel, Fred Gullickson, and Jacob Winsiewski immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

"(b) Make whole the persons named in paragraph 2(a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each would have earned as wages during the period from the date of such discrimination against him to the date of the offer of reinstatement, less any amount each has earned during that period;

[fol. 46] "(c) Post immediately in conspicuous places throughout all departments of its plants in Dearborn and Highland Park, Michigan, notices to its employees stating that the respondent will cease and desist in the manner aforesaid;

"(d) Maintain such notices for a period of at least sixty (60) consecutive days from the date of posting;

"(e) Notify the Regional Director for the Seventh Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

"And it is further ordered that the allegations of the complaint be, and they hereby are, dismissed with respect to Raymond Jewell, George Sazynski, Guiseppe Gregorio, Gabriel Bobaila, Leo J. Krugh, and Daniel Devor."

7. Upon information and belief, the purported order set forth in paragraph 6 hereof was not the order of the Board, and at the time of its purported entry the Board did not consider, and had not considered, the subject matter thereof, and had not reached any opinion in respect of the issues presented in the proceeding before it, and did not duly make and enter said order in the manner required by the Act.

8. Thereafter, on December 23, 1937, there was delivered to respondent's attorney of record in the proceeding before the Board an unsigned, unauthenticated and uncertified mimeographed document entitled in said proceeding and headed "Decision and Order" and on the same date there was delivered to respondent at its principal office at Dearborn, Michigan, a document of the same description. Said document contained a so-called "Statement of the Case," so-called "Findings of Fact," so-called "Conclusions of Law" and a so-called "Order." The so-called "Order"

contained in said document was the same as the purported order referred to and set forth in paragraph 6 hereof.

9. Thereafter, on January 3, 1938, petitioner filed with the Board its petition to vacate and set aside said purported order and for rehearing, which petition the Board denied on January 4, 1938. A true copy of said petition is annexed hereto as Exhibit A and is hereby made a part hereof.

[fol. 47] 10. Said purported order and each and every part thereof is invalid and void because unaccompanied and unsupported by any findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

11. Said purported order and each and every part thereof is invalid and void because the purported findings of fact, if any, upon which it is based are not findings of fact within the meaning and requirement of Section 10(c) of the Act, or complying with due process of law.

12. Said purported order and each and every part thereof is invalid and void because the purported findings of fact upon which it is based are, in material and controlling respects, not supported by evidence, within the meaning of the provisions of Section 10 of the Act, and are contrary to the evidence, and also because said purported findings of fact are inadequate, incomplete and insufficient in that material facts which are conclusively established by the evidence have been disregarded and ignored by the Board, and also because said purported findings of fact disregard and ignore matters of current history material to the issues which are common knowledge and which the Board in the exercise of its quasi-judicial powers ought to have taken into consideration.

13. The Trial Examiner by whom the Board held its hearing interrogated many of the witnesses, not in a fair, dispassionate and impartial manner for the purpose of eliciting the truth, but in such manner as to cause them to believe that he desired them to give testimony unfavorable to petitioner and to withhold testimony favorable to petitioner, [fol. 48] and in such manner as to cause them to believe that they could with impunity give partial, misleading and false testimony, provided the effect produced thereby was unfavorable to petitioner.

14. Said Examiner overruled proper objections of counsel for petitioner to questions which counsel for the Board asked witnesses, and sustained improper objections of counsel for the Board to questions which counsel for petitioner asked witnesses.

15. Said Examiner completely ignored not only the rules of evidence generally prevailing in courts of law and equity but also the fundamental principles of the law of evidence and the basic principles of justice, and accepted evidence having no probative value and worthy of no credence, and which would not be relied on by responsible persons in their own serious affairs, and which did not meet the test laid down by the Board itself (NLRB 1st An. Rep. 23) as being the kind of evidence that would affect fair-minded men in the conduct of their daily and more important business.

16. Said Examiner conducted himself at said hearing as an advocate opposed to petitioner, with a view to causing the record of said hearing to be adverse to petitioner, and thereby and in other respects failed to perform his duties as agent of a judicial or quasi-judicial body.

17. By reason of the matters alleged in the foregoing paragraphs 13 to 16, inclusive, said purported order and each and every part thereof is invalid and void because petitioner was denied the full and fair hearing required by the Act and guaranteed by the Fifth Amendment of the Constitution of the United States.

18. From August 3, 1937, when the proceedings before the Board were transferred to it, as alleged in the foregoing [fol. 49] paragraph 5, until December 23, 1937, when the purported order of the Board was purported to have been served upon petitioner, the Board communicated in no way with petitioner with respect to said proceeding, and the Board at no time afforded to petitioner any opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or to any proposed order.

19. By its acts and omissions as alleged in paragraph 18 hereof, the Board, without notice to petitioner, departed from the normal procedure contemplated by the Rules and Regulations of the Board, and failed to accord petitioner a full and fair hearing as required by the Act and the due process clause of the Fifth Amendment.

20. Neither the Board nor any member thereof was personally present at the taking of testimony or saw or heard any of the witnesses at said hearing testify.

21. Upon information and belief, neither the Board nor any member thereof read the testimony of the witnesses who testified before the Trial Examiner or read or inspected the exhibits received in evidence.

22. Upon information and belief, neither the Board nor any member thereof judicially weighed or appraised the evidence received at said hearing.

23. Upon information and belief the purported decision and order of the Board in substantially the form in which it was purported to have been served upon the petitioner was prepared by subordinates of the Board and not by the Board or any member thereof.

24. Upon information and belief, between August 3, 1937, and December 23, 1937, it was the practice of the Board in [fol. 50] proceedings transferred to it to submit the records therein to a so-called Review Section, composed of subordinates of the Board, for the purpose of analyzing such records and for the preparation of proposed findings of fact.

25. Upon information and belief, between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section for the preparation of proposed findings of fact, which were thereafter prepared by said Review Section and submitted to the Board, without notice to petitioner, and without affording to petitioner any opportunity to object or except thereto.

26. Upon information and belief, from the period between August 3, 1937, and December 23, 1937, it was the practice of the Board in proceedings transferred to it to submit the records therein to said Review Section for the preparation of proposed conclusions of fact and law, and proposed terms of an order, as well as for the preparation of proposed findings of fact.

27. Upon information and belief, that between August 3, 1937, and December 23, 1937, the record in the proceeding before the Board was submitted to said Review Section, which thereafter prepared proposed conclusions of fact and law and proposed terms of an order, and submitted the same

to the Board, without notice to petitioner, and without affording to petitioner any opportunity to object or except thereto.

28. The record in the proceeding before the Board, submitted to said Review Section as aforesaid, was not submitted pursuant to any order made by the Board and served upon or communicated to the petitioner, and the Board at no time made known to petitioner the identity of the persons to whom said record was so submitted.

[fol. 51] 29. Upon information and belief, after transfer of the proceedings to the Board, certain subordinates of the Board prepared proposed findings of fact, conclusions of fact and law, and proposed terms of an order, and submitted the same to the Board, without notice by the Board to petitioner and without affording to petitioner any opportunity to object or except thereto.

30. By each of its acts and omissions as alleged in the foregoing paragraphs 25, 27, 28 and 29, and by all of said acts and omissions taken together, the Board departed from its own rules of procedure, by which it is provided that, where an intermediate report is prepared for submission to the Board, the same shall be served upon the respondent in the proceeding and opportunity afford to except thereto.

31. Upon information and belief, neither the Board nor any member thereof read any fair condensation or analysis of the evidence received at the hearing before the Trial Examiner.

32. Upon information and belief, the Board, in making its findings of fact, conclusions and purported order, relied either solely or in part upon the proposed findings, conclusions and order prepared by its subordinates and submitted to the Board as stated in the foregoing paragraphs 25, 27, 28 and 29.

33. Petitioner was never accorded by the Board and did not receive any opportunity to inspect said proposed findings, conclusions and order or to object or except thereto or to point out any errors or improper statements or improper inferences or improper conclusions or improper terms of order therein, or to urge that said proposed [fol. 52] findings were not in accordance with the evidence.

34. Upon information and belief, the Trial Examiner, who saw and heard the witnesses testify at the hearing, did not prepare or submit to the Board any intermediate report, or any proposed findings of fact or any recommendations as to findings of fact, and did not inform the Board as to his opinion or belief as to the credibility of the several witnesses who testified at the hearing.

35. Upon information and belief, the Board received from its subordinates, including its attorney who conducted the hearing on its behalf before the Trial Examiner, reports, memoranda and other communications containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; the Board in making its order relied in part upon said reports, memoranda and communications, without personally checking or weighing or appraising the evidence in order to determine whether or not said inferences and conclusions were justified, and without affording petitioner any opportunity to test, refute or explain said inferences, conclusions or matters extrinsic to the record.

36. Upon information and belief, the Board in making its purported order was not, as it ought to have been, guided solely by the evidence, but in reaching its conclusions was improperly influenced by extraneous considerations, political and otherwise, and the Board, in making and entering its purported decision and order, consulted with persons other than members of the Board or its employees with respect thereto.

37. Upon information and belief, the findings contained in the purported decision and order of the Board were not its findings, and were not made as a result of judicial consideration or weighing or appraisal of the evidence by it, but were the findings of its subordinates, who under the [fol. 53] Act had no authority to make any findings.

38. Petitioner was without knowledge of the matters alleged in the foregoing paragraphs 21 to 36, inclusive, hereof until after December 23, 1937, and is without knowledge as to the identity of the subordinates of the Board referred to in said paragraphs.

39. By reason of the matters alleged in the foregoing paragraphs 18 to 38, inclusive, said purported order and

each and every part thereof is invalid and void because petitioner was denied a full and fair hearing as required by the National Labor Relations Act and guaranteed by the Fifth Amendment to the Constitution of the United States.

40. By reason of the matters alleged in the foregoing paragraphs 22 to 38, inclusive, said purported order and each and every paragraph thereof is invalid and void because the Board unlawfully delegated to its subordinates powers conferred upon it by said Act, or the exercise of a substantial part thereof.

41. The Board in its purported findings of fact referred to and relied upon evidence of a patently incompetent, unreliable and prejudicial character.

42. In the making of its purported findings and order, the Board failed to consider facts and circumstances required to be considered, and its purported findings do not embrace basic facts required to support the order.

43. The Board included in its purported findings of fact statements which are supported by no evidence whatever and statements which misrepresent the evidence in material respects.

44. The Board phrased its purported findings of fact in [fol. 54] language, and included in its purported findings sentences and paragraphs, not appropriate to a statement of findings of fact but calculated to and having the effect of castigating petitioner before its employees and the public generally and of supplying material for reproduction in the press.

45. The Board relied in its purported findings of fact upon evidence which the Examiner had excluded by rulings which the Board in its order affirmed.

46. The Board made its purported order and the purported findings of fact upon which its order is based without first having accorded to petitioner the substance of a full and fair hearing, the hearing in this proceeding being inadequate in the respects set forth in the foregoing paragraphs 13 to 40, inclusive.

47. By reason of the matters alleged in the foregoing paragraphs 41 to 46, inclusive, and other matters, said purported order is invalid and void because the Board, in

making said purported order and the purported findings of fact upon which said order is based, did not act in a judicial or quasi-judicial manner as is required by Section 10 of the Act and by the due process clause of the Fifth Amendment to the Constitution.

48. Upon information and belief the purported decision and order of the Board was not its order but was the order of its subordinates, and the purported conclusions of the Board were not the conclusions of the Board made as a result of its judicial consideration or weighing and appraising of the evidence but were the conclusions of its subordinates who, under the Act, had no authority to make [fol. 55] said order or conclusions.

49. The Board arbitrarily refused to set aside its purported order and grant to petitioner a rehearing for the purposes set forth in the above-mentioned petition filed with the Board on January 3, 1938, and thereby abused its discretion.

50. Said purported Order, and each and every part thereof, is invalid and void because none of the acts found by the Board to have been done by petitioner occurred in commerce, or burdened or obstructed commerce or the free flow of commerce, or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, within the meaning of the Act when construed in the light of constitutional limitations upon the powers of Congress, including the Tenth Amendment to the Constitution, and because the Act, if construed to apply to the acts found by the Board to have been done by petitioner, is, as so construed, unconstitutional and void in that it attempts to regulate matters not within the powers conferred upon Congress by the Constitution and violates the Tenth Amendment thereto, and because the acts found by the Board to have been done by petitioner are, individually and collectively, so minor in character, scope and duration that their possible effect upon interstate commerce is only indirect, remote, incidental and collateral.

51. The National Labor Relations Act, in so far as it provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", and in conferring judicial power upon a Board which is both prosecutor and judge, violates Article III of the Constitution

[fol. 56] of the United States, in that it purports to grant judicial power to a non-judicial tribunal whose members hold office for limited terms, for terms not solely dependent on good behavior, and are removable otherwise than by impeachment, and which tribunal is neither the Supreme Court nor an inferior court ordained and established by the Congress.

52. The provision contained in Section 10(e) of the National Labor Relations Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive", if so interpreted as to require the Court to enter a decree enforcing provisions of the order without its weighing the evidence or giving any consideration thereto other than for the purpose of seeing whether there is some evidence to support the order and the purported findings of fact upon which based, without consideration of any other facts or circumstances of equitable cognizance, and without considering for itself whether the conduct of the petitioner is sufficient to warrant the entry of a decree of enforcement having the effect of an injunction issuing out of a court of equity, and without the exercise of any judicial discretion whatever, is repugnant to Article III of the Constitution of the United States whereby the judicial power of the United States is expressly and exclusively conferred upon the Supreme Court of the United States and such inferior courts as Congress may from time to time establish, and to the provisions of Article V of the Amendments to the Constitution of the United States, whereby it is provided that no person shall be deprived of life, liberty or property without due process of law.

[fol. 57] 53. Section 10(b) of the Act provides that a proceeding before the Board relating to alleged unfair labor practices as defined in said Act may be instituted only by the issuance by the Board of a complaint and service thereof upon the person complained of. The powers thus sought to be conferred upon the Board by Section 10(b) of the Act are not judicial in nature, but are of the nature of the duties of a public prosecutor. Section 10(c) of the Act provides that if, after hearing before the Board, the Board shall be of the opinion that any person named in such complaint has engaged in or is engaging in any unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such

person to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. Sections 10(e) and (f) of the Act provide that in any proceeding in court to enforce or set aside an order of the Board the findings of the Board as to the facts, if supported by evidence, shall be conclusive. The powers thus sought to be conferred upon the Board by Sections 10(c), (e) and (f) of the Act are judicial in nature. The Act thus seeks to confer upon the Board the functions of both prosecutor and judge in the same proceeding, such proceeding being essentially judicial in nature, and thereby violates Articles I, II and III of the Constitution of the United States, which provide for the separation of legislative, executive and judicial powers, and thereby also violates the Fifth Amendment of the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law.

[fol. 58] 54. Paragraph 1 of the purported order herein exceeds in scope any order which the Board may lawfully make under the National Labor Relations Act on the record and findings in the proceedings before it.

55. Paragraph 1(a) of said purported order is invalid and void because the purported findings of the Board that petitioner discharged 29 of the more than 80,000 persons employed at its River Rouge plant under circumstances constituting an unfair labor practice is insufficient to support any order directing petitioner to cease and desist from discharging any of its employees in the future.

56. Paragraph 1(d) of said purported order is invalid and void because there is no finding of fact and no evidence to support any finding of fact that the persons found by the Board to have been threatened, assaulted or beaten were employees of petitioner.

57. Paragraph 1(d) of said purported order, in so far as it orders petitioner to cease and desist from in any manner interfering with, restraining or coercing any person other than employees of respondent, is invalid and void because it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact or upon any basis whatsoever.

58. Paragraph 1(d) of said purported order is invalid and void in that said paragraph purports to deprive petitioner of its lawful right to take appropriate action to eject trespassers from its property and to prevent its employees from engaging in acts on or in the vicinity of its property which would be calculated or would tend to interfere with the ingress and egress of persons to and from petitioner's [fol. 59] plant and to cause breaches of the peace among employees of petitioner.

59. Paragraph 1(d) of said purported order is invalid and void because the Act is inapplicable to acts of physical violence.

60. Paragraph 1(e) of said purported order is invalid and void because not authorized by any provision of the Act when construed in the light of the requirements of the First Amendment to the Constitution and because, if the Act be construed to authorize said Paragraph 1(e), the Act is to that extent unconstitutional and void as an abridgement of the freedom of speech and of the press in violation of the First Amendment to the Constitution.

61. Paragraph 1(f) of said purported order is invalid and void because, being a restatement of the provisions of Section 7 and Section 8(1) of the Act, it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact.

62. Paragraphs 2(a) and 2(b) of said purported order are invalid and void because they are not supported by any finding of the Board that the persons named in said paragraphs have been reasonably diligent in seeking employment elsewhere or that said persons have not had and rejected opportunities to obtain substantially equivalent employment elsewhere or that said persons have ever requested petitioner to reinstate them.

63. Paragraph 2(b) of said purported order is invalid and void because it fails to provide that the payments to be made by petitioner to each of the persons named in paragraph 2(a) of said order shall equal the amount which each [fol. 60] such person would have earned as wages during the period from the date of his discharge to the date of the offer of reinstatement, less any amount which, with the exer-

cise of reasonable diligence, he would have earned during that period and any amount received by him from any source by reason of his unemployment, and thereby fails to effectuate the policies of the Act, and because it fails to provide any method or procedure for the determination of the amount to be paid by petitioner to the persons referred to therein.

64. Paragraphs 1(a), 1(b), 1(c) and 1(d) of said purported order, in so far as they order petitioner to cease and desist from engaging in certain practices with respect to any labor organization or the members of any labor organization other than the particular labor organization named in each of said respective paragraphs, are invalid and void because they are unsupported by the purported findings of fact and exceed the issues raised in the proceeding.

65. Paragraph 2(c) of said purported order is invalid and void because there is no evidentiary finding by the Board, and no evidence to support any evidentiary finding, that the action ordered therein to be taken will effectuate the policies of the Act, and because such action will not effectuate the policies of the Act, and because said paragraph fails to set forth in words and figures the notice required to be posted by petitioner, and because the Act, when construed in the light of the requirements of the Fifth Amendment to the Constitution, does not authorize the Board to order petitioner to state that it has heretofore engaged in any unfair labor practice.

[fol. 61] 66. Said purported order and each and every part thereof, in so far as directed to officers and agents of petitioner, is invalid and void because it exceeds in scope any order that the Board may lawfully make upon the basis of its purported findings of fact or upon any basis whatsoever.

67. Paragraph 1 of said purported order, in so far as it orders respondent to cease and desist from any acts directed toward any of its employees other than its employees at its plants in Dearborn and Highland Park, Michigan, is invalid and void because it is unsupported by the purported findings of fact and goes beyond the issues raised in the proceedings.

Wherefore, petitioner prays this Honorable Court that it cause notice of the filing of this petition to be served upon

the Board and that this Court take jurisdiction of the proceeding and the questions determined therein and make and enter a decree setting aside said purported order and each and every part thereof, and petitioner prays for such other and further relief as may be just and proper.

Dated, May 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

[fols. 62-75] Exhibit "A" to petition omitted. See Exhibit "A," printed side page 12-16, ante.

[fols. 76-81] Notice and motion to consolidate causes omitted. Printed side page 18, ante.

[fol. 82] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION TO COMPEL THE NATIONAL LABOR RELATIONS BOARD TO CERTIFY TRANSCRIPT OF RECORD AND FOR TEMPORARY RELIEF—Filed May 5, 1938

To Charles Fahy, Counsel for National Labor Relations Board, Shoreham Building, Washington, D. C.:

Please Take Notice that on the 9th day of May, 1938, at 9:00 A.M. (E. S. T.), or as soon thereafter as counsel can be heard, the annexed motion to compel the National Labor Relations Board to certify transcript of record and for temporary relief will be presented to the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Dated, May 4, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent-Petitioner, Ford Motor Company.

Due service acknowledged this — day of May, 1938.

——— ———, Attorney for National Labor Relations Board.

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION TO COMPEL THE NATIONAL LABOR RELATIONS BOARD TO FURNISH A CERTIFIED TRANSCRIPT OF RECORD AND FOR A TEMPORARY INJUNCTION—Filed May 5, 1938

Comes now Ford Motor Company, the petitioner above named, and respectfully shows this Honorable Court as follows:

1. On January 7, 1938, pursuant to Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§ 151-166), the National Labor Relations Board (hereinafter called the Board) filed with this Court in a cause entitled "National Labor Relations Board, Petitioner, v. Ford Motor Company, Respondent, No. 7919" its petition for the enforcement of a purported order of the Board purported to have been issued on December 22, 1937, in the proceeding known upon the Board's files as Case No. C-199 and entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America", and also filed with this Court a certified transcript of the record of such proceeding before the Board.

2. On April 29, 1938, the Board served upon counsel for petitioner, and on May 2, 1938, filed with this Court, a motion [fol. 84] for leave to withdraw without prejudice its petition for enforcement of its purported order and the certified transcript of record filed with this Court.

3. On May 4, 1938, petitioner filed herein under the provisions of Section 10(f) of the National Labor Relations Act a petition for a review of and to set aside the purported order of the Board referred to in paragraph 1 above.

4. Petitioner believes it would be futile for it to request the Board to certify a transcript of record to be filed herein in view of the statements contained in the Board's motion

to withdraw referred to in paragraph 2 above and in public statements reported in the press as coming from the Board and its General Counsel to the effect that the Board proposes, if its motion to withdraw be granted, to reopen the proceeding against the petitioner for the purpose of correcting a few of the many errors which petitioner alleges and believes render null and void the Board's purported order and the entire proceeding and in view of the fact that the certification of such record would, by continuing jurisdiction of the proceeding in this Court, prevent the Board from following its announced proposed procedure.

5. The petitioner believes and alleges that, unless the relief hereinafter prayed for is granted, it will suffer irreparable damage in that the Board will thus be permitted to avoid a judicial determination of the validity not only of the Board's order but also of the entire proceeding before the Board and to indefinitely defer the date on which such judicial determination can be had while at the same time keeping alive a proceeding which the petitioner contends [fol. 85] is so ridden with prejudicial errors that no valid order can ever be entered by the Board therein.

Wherefore, petitioner prays this Honorable Court for an order directing: either (1) that the certified transcript of record now on file in this Court in Cause No. 7919 be deemed forthwith to have been filed herein; or (2) that the Board provide petitioner forthwith with a certified transcript of the entire record in the proceeding before the Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199; and that the Board, its attorneys, agents and representatives, and each of them, be restrained and enjoined from taking any action of any nature whatsoever, until five days after said certified transcript has been furnished to petitioner, in or with respect to the proceeding entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199; and for such other and further relief as may be just and proper.

Dated May 4, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

[fol. 86] *Duly sworn to by Frederick H. Wood. Jurat omitted in printing.*

[fols. 87-90] Opposition to Motion to Consolidate Causes and to Motion to Compel Certification of Transcript of Record and for a Temporary Injunction omitted. Printed side page 26, ante.

[fol. 91] Exhibit "A" to opposition omitted. See exhibit "A", printed side page 30, ante.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

ORDER AS TO RECORD BEFORE BOARD—Filed May 9, 1938

Application having been duly made by Ford Motor Company, petitioner herein, for an order directing that the certified transcript of the entire record in the proceeding before the National Labor Relations Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199 now on file in this Court in Cause No. 7919 be deemed forthwith to have been filed herein, and counsel for the respective parties having been heard, and after due deliberation thereon, it is hereby

Ordered that the certified transcript of the entire record in the proceeding before the National Labor Relations Board entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America" and known upon the Board's files as Case No. C-199 now on file in this Court in Cause No. 7919 be deemed forthwith to have been filed in this cause, No. 8019, as of the [fol. 93] time of the filing in this Court by petitioner of its petition to review and set aside the order of the Board purportedly made against it on or about December 22, 1937.

Dated May —, 1938.

(Signed) Xen Hicks, Circuit Judge. —— ——, Circuit Judge. —— ——, Circuit Judge.

[fol. 94] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019.

[Title omitted]

NOTICE OF MOTION—Filed May 19, 1938

Please Take Notice that the annexed motion for leave to amend the petition of Ford Motor Company, filed herein May 4, 1938, for a review of and to set aside an order of the National Labor Relations Board, and the proposed order thereon, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit, Federal Building in the City of Covington, Kentucky, on the 23rd day of May, 1938, at 9 o'clock (Eastern Standard Time) in the forenoon of that day, or as soon thereafter as it may be presented.

Dated, May 18, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

Receipt of the above notice together with a copy of the annexed motion on the 18th day of May, 1938, is hereby ac-
[fol. 95] knowledged.

Charles Fahy, Robert B. Watts, Attorneys for National Labor Relations Board.

[fol. 96] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION FOR LEAVE TO AMEND PETITION FOR A REVIEW AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed May 19, 1938

Now Comes Ford Motor Company, petitioner in the above-entitled cause, by its attorneys, and moves this Court for leave to amend its petition filed herein May 4, 1938, for a

review of and to set aside an order of the National Labor Relations Board by substituting for paragraph 35 thereof the following paragraphs:

35. Upon information and belief, the Board received from its subordinates, including its attorneys who conducted the hearing on its behalf before the Trial Examiner, and from other persons connected with the prosecution of the complaint before the Board, reports, memoranda and other communications, oral and written, containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; and in making its purported order the Board considered and relied upon said reports, memoranda and communications, without personally weighing, [fol. 97] checking or appraising the evidence in order to determine whether or not said inferences and conclusions were justified, and without exhibiting the same to petitioner or affording petitioner any opportunity to test, refute or explain said inferences or conclusions or said matters extrinsic to the record.

35-a. Upon information and belief, the said subordinates of the Board, who prepared proposed findings of fact, conclusions of fact and law, and proposed terms of an order, and submitted the same to the Board, received from other employees of the Board, including its attorneys who conducted the hearing on its behalf before the Trial Examiner and from other persons connected with the prosecution of the complaint before the Board, reports, memoranda and other communications, oral and written, containing their inferences and conclusions with respect to the evidence in the record, and in addition containing mention of matters extrinsic to the record; and considered and relied upon the same, without affording to the petitioner any opportunity to test, refute or explain said inferences or conclusions or matters extrinsic to the record.

35-b. Upon information and belief, during the progress of the hearings before the Trial Examiner, who was purportedly acting as a judicial representative of the Board, he consulted upon the merits of the case out of the presence of the petitioner with the attorneys prosecuting the case for the Board and for the Union.

35-c. By reason of the facts alleged in paragraphs 35 and 35-a and 35-b hereof, and by reason of the actions of the [fol. 98] Trial Examiner set forth in paragraphs 13 through 16 hereof, and by reason of the manner in which the charge against petitioner was investigated, and by reason of the manner in which the complaint against petitioner was heard before the Trial Examiner, and by reason of the manner in which the proceedings were conducted before the Board and in which the case was considered and determined by it, the ability of the Board to function with impartiality in its judicial or quasi-judicial capacity was materially prejudiced by the activities of its investigating and prosecuting arms, and the investigating, prosecuting and judicial functions of the Board were so commingled as to render wholly invalid its purported order and any other order which the Board might seek to make upon the proceedings had herein, and petitioner was thereby deprived of a full, fair and open hearing and of due process of law and of the protection guaranteed it by Article III of the Constitution of the United States.

Dated, May 18, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Petitioner.

[fol. 99] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

OPPOSITION TO MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW—Filed May 23, 1938

Now comes National Labor Relations Board, respondent in the above-entitled cause, by its attorney, and in opposition to the motion of Ford Motor Company, petitioner, for leave to amend its petition filed herein May 4, 1938, for a review of and to set aside an order of the Board issued

December 22, 1937, respectfully shows as follows:

1. It appears from the face of said motion that the facts alleged upon information and belief in paragraphs 35 and 35-a, and the conclusions alleged in paragraph 35-c of said motion relate to the Board's method of decision and to the mental processes of the Board. For reasons and upon authorities more fully to be urged by the Board in an opposition to the Company's petition for a commission to take depositions, which opposition is incorporated herein by reference and will be filed in the Court on or before May 31, 1938, pursuant to leave granted by Judge Hicks on May 20, 1938, said matters are not material to the issues of the case and inquiry by courts may not be had into such matters, and, in the circumstances of this case, petitioner is estopped [fol. 100] to raise said matters as objections to the validity of the Board's order.

2. It appears from the face of said motion that the facts alleged upon information and belief in paragraphs 35, 35-a, and 35-b, and the conclusions alleged in paragraph 35-c of said motion, especially those alleged in said paragraphs 35-b and 35-c, relate to matters which were not urged as objections before the Board. Consequently, according to the terms of Section 10 of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 et. seq.) and for reasons more fully to be given in the Board's said opposition to be filed herein, said matters may not be urged before the court as objections to the validity of the Board's order.

Wherefore the Board, by its attorney, prays that said motion be denied forthwith, or, in the alternative, that the court take no action with respect to said motion until after said opposition of the Board has been filed and considered by the Court, and that said motion then be denied.

Dated at Washington, D. C., this 21st day of May, 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

[fol. 101] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION TO VACATE ORDER

To: Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company:

Please Take Notice that on the 6th day of June 1938, at 9 a. m. (E.S.T.), or as soon thereafter as counsel can be heard, the annexed motion to vacate order will be presented to the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

Dated June 1, 1938.

Receipt of above notice acknowledged this 1st day of June 1938.

(Signed) Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath de Gersdorf, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 102] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION TO VACATE ORDER—filed June 2, 1938

Comes now the National Labor Relations Board, respondent in the above-entitled cause, by its attorney, and shows as follows:

1. On January 7, 1938, pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. §§

151-166), the Board filed in this Court in Cause No. 7919, entitled "National Labor Relations Board v. Ford Motor Company," its petition for enforcement of its order issued against the Ford Motor Company on December 22, 1937, in the proceeding known upon the Board's files as Case No. C-199 and entitled "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," and also filed in this Court a certified transcript of the record of such proceeding before the Board.

2. On May 2, 1938, pursuant to notice, the Board filed in this Court a motion for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the transcript of record, for the purpose of vacating and setting aside its order, pursuant to Section 10 (d) of the Act, and of having further proceedings before the Board. A copy of said notice and motion is hereto annexed, marked Exhibit A, and made a part hereof. The memorandum of Ford Motor Company in opposition to said motion is on file in this Court in Cause No. 7919 and is hereby referred to and made a part hereof.

[fol. 103] 3. On May 4, 1938, the Company filed in this Court a petition to review and set aside the said order of the Board issued December 22, 1937.

4. On May 5, 1938, the Court issued an order granting the said motion of the Board for leave to withdraw from the Court without prejudice its petition for enforcement of its order and the certified transcript of record filed in the Court on January 7, 1938. A copy of said order is hereto annexed, marked Exhibit B, and made a part hereof.

5. On the following day, May 6, 1938, pursuant to Section 10 (d) of the Act, the Board served notice upon the Company that on May 10, 1938, unless sufficient cause to the contrary then appeared, the Board would vacate and set aside its order for the purpose of further proceedings before the Board. A copy of said notice is hereto annexed, marked Exhibit C, and made a part hereof.

6. On May 9, 1938, while said notice of the Board was outstanding in the case before the Board, and while further proceedings before the Board had thus been initiated and were not completed, upon a motion by the Company which was opposed by the Board, the Court issued an order that

the certified transcript of the record filed in the Court on January 7, 1938, upon the Board's petition for enforcement in Case No. 7919 be deemed to be filed in the case herein as of the date of the Company's petition for review (May 4, 1938), notwithstanding the fact that said record no longer constituted the "entire record in the proceeding" as provided in Section 10 (f) of the Act, further proceedings having been initiated and been pending and are now pending before the Board. The Court also modified its order of May 5, 1938, in No. 7919 in so far as the said order granted leave to the Board to withdraw the transcript of record.

7. On May 10, 1938, the Company having objected that by reason of the pendency of the proceedings in this Court the Board was without jurisdiction to proceed, the Board held its action under advisement and has not acted further under Section 10 (d) of the Act.

[fol. 104] 8. The Court's order of May 9, 1938, directing that the certified transcript of the record in No. 7919 be deemed to have been filed in the case herein as of May 4, 1938, was contrary to Section 10 (d) and (f) of the Act, and the Court had no jurisdiction to make said order. In the Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus, decided by the Supreme Court, May 31, 1938. In that case it was held that the United States Circuit Court of Appeals for the Third Circuit was without jurisdiction upon a petition for review of the Board's order against Republic Steel Corporation to prevent the Board from vacating its order pursuant to Section 10 (d) and to order the filing of a transcript of the record as it stood prior to the decision of the Board to vacate its order. A mimeographed copy of the Supreme Court's decision is herewith submitted. Clearly the decision is applicable to the case herein. The order of May 9 herein was made subsequent not merely to the Board's decision to vacate its order, but to the actual initiation of proceedings pursuant to Section 10 (d) by the Board's notice of May 6. No record had been filed in this case and the record on file in No. 7919 on May 4, the date of the Company's petition to review, was not the entire record on May 9, further proceedings in the interim having been initiated before the Board. The Court could not assume jurisdiction of this case as of May 4, or as of any date

prior to the filing of the entire record, and in this respect it is believed that the Court's order of May 9 was inadvertent, as more fully appears in the following paragraph. The Act in providing that upon the filing of a certified transcript of the entire record "the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding" (Section 10 (e) and (f), precludes the assumption of jurisdiction as of a date prior to such filing and to the service of notice thereof. [fol. 105] Moreover, in this case, proceedings were and are pending before the Board as shown in paragraphs 5, 6, and 7, supra, and the Board's final action, which may be reviewed under the Act, has not yet been had. In these circumstances, if the Court were to proceed to determine the case, in the language of the Supreme Court in the decision cited,

"a hearing would have resulted respecting the legality of supposed action of the Board which was not in law or fact the final action, review of which the statute provides."

The decision of the Supreme Court is the more clearly controlling of the issue herein for the reason that the Company in this case made no request of the Board at any time for a certified copy of the transcript of the entire record, or of any record, and for the further reason that the Company filed its petition for review on May 4 only in an endeavor to prevent the Board from proceeding pursuant to Section 10 (d).

9. It is believed that the Court's order of May 9, 1938, was inadvertent in so far as it directed that the record be deemed filed "as of the time of the filing in this Court by petitioner of its petition to review and set aside the order of the Board purportedly made against it on or about December 22, 1937." At no time was it pointed out to the Court or to Judge Hicks that the order presented by the Company to Judge Hicks for signature contained any such provision. No proposed order was attached to the Company's motion papers and neither in said papers nor in the oral argument did the Company move the Court to issue an order directing the filing of the record as of a prior date. The decision of the Court as announced from the bench on May 9, 1938, provided simply that the certified transcript of record in No. 7919 "will be regarded as the certified transcript in this case." Upon information and belief a memorandum of the

decision as so announced is on file in the office of the Clerk [fol. 106] of the Court.

10. The Company will be in no wise aggrieved by the granting of the motion herein and the completion of the proceedings pending before the Board. In the Matter of the Petition of the National Labor Relations Board, supra.

Wherefore the Board, by its attorney, moves this Court for an order vacating and setting aside its order of May 9, 1938, directing that the certified transcript of the record filed in No. 7919 be deemed filed in the case herein as of the time of the filing of the Company's petition for a review of the Board's order.

Dated, Washington, D. C., this 1st day of June, 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

[fol. 107] *Duly sworn to by Robert B. Watts. Jurat omitted in printing.*

[fols. 108-112] Exhibit "A" to motion omitted. Printed side page 13, ante.

[fol. 113] Proposed order granting motion for leave to withdraw without prejudice omitted in printing.

[fol. 114] Exhibit "B" to motion omitted. Printed side page 25, ante.

[fol. 115] Exhibit "C" to motion omitted. See exhibit "A", printed side page 30, ante.

[fol. 116] J-205.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 21, Original

In the Matter of the Petition of the NATIONAL LABOR RELATIONS BOARD for a Writ of Prohibition and for a Writ of Mandamus.

(May 31, 1938.)

Mr. Justice ROBERTS delivered the opinion of the Court:

The motion before us involves a construction of Section 10 (d) (e) and (f) of the National Labor Relations Act,[1] providing for review of orders of the National Labor Relations Board.

May 16, 1938, the Board filed in this court a motion for leave to file a petition for writs of prohibition and mandamus directed to the judges of the United States Circuit Court of Appeals for the Third Circuit. Attached to the motion was the petition which set forth the following facts.

April 8, 1938, the Board, in a cause pending before it, issued an order directing the Republic Steel Corporation to desist from certain unfair labor practices and to take certain affirmative action. April 18 Republic filed in the Circuit Court of Appeals a petition for review alleging that the order violated the constitutional guarantee of due process because it was entered without an opportunity to Republic to support its contentions by argument or brief and thus the Board had denied it the hearing to which it was entitled. On the same day Republic requested of the Board a transcript of the entire record of its proceedings and the General Counsel of the Board replied: "I have your letter of April 18th, and received today a copy of your petition for review of the Board's order filed in the Third Circuit. We will proceed to get up the record as promptly as possible for certification to the court."

The rules of the Board extend to any party the right, within a reasonable period after the close of a hearing, to present oral argument before the trial examiner and, with his permission, to file briefs. They further provide that

[1] 49 Stat. 454; U. S. C., Supp. II, Tit. 29, § 160 (d) (e) (f).

the Board may decide a cause with or without allowing the parties to present oral argument before the Board itself or to submit briefs to the Board. It is the Board's practice to grant leave to submit briefs to it or to make oral argument before it whenever so requested, but the rules do not expressly state that such a request may be made or that the request, if made, will be granted. No such request was made by Republic and no brief was received or oral argument heard before the entry of the order of April 8, 1938. The rules also provide for hearing before a trial examiner of causes initiated by the filing of charges before a regional director unless the cause is transferred for hearing before the Board in Washington. If the hearing is before an examiner he is to render an intermediate report containing findings of fact and recommendations as to the disposition of the cause, which are to be served upon the parties, and they are entitled to take exceptions to the intermediate report. In cases initiated by charges filed with the Board in Washington, or transferred for hearing before the Board, it may direct the trial examiner to prepare an intermediate report but the rules do not require that such a report shall be prepared or served, or that the Board shall serve its own proposed findings of fact and conclusions of law. The complaint against Republic was initiated by charges filed with the Board. The Board did not direct the trial examiner to prepare an intermediate report and none was prepared or served, nor did the Board serve its own proposed findings [fol. 117] of fact and conclusions of law prior to the entry of its order.

Subsequent to April 25, 1938, the Board instituted the practice of notifying the parties in all proceedings before it of their right to submit briefs to the Board and, upon request, to present oral argument to the Board; and further determined that, in cases thereafter to be decided, which had been initiated before it, or transferred to it for hearing (except for special reasons in particular cases) an intermediate report should be prepared by the trial examiner and served upon the parties or, in the alternative, proposed findings of fact and conclusions should be prepared by the Board and similarly served with express notice to the parties of their right to take exceptions to the report or the proposed findings and, upon request, to be heard by the Board, orally or upon brief in support of the exceptions. In

cases already decided, in which complaint had been made of the omission of an intermediate report or proposed findings, or of the lack of written or oral argument, the Board determined to vacate its orders, to restore the causes to its docket, and to reconsider and redetermine them after granting full opportunity of exception to proposed findings and conclusions and after the service of notice of the right of the parties to submit briefs and to be heard by the Board if they should so request. Among the cases in this category was that involving Republic.

April 30, 1938, Republic moved the Circuit Court of Appeals for a stay of the Board's order and, upon the hearing of the motion, the Board advised the court that it was considering vacating the order. May 3, upon ex parte application of Republic, the court issued a rule, returnable May 13, requiring the Board to show cause why it should not file in the court a certified transcript of the record of the proceedings against Republic and made an order restraining the Board from taking any steps or proceedings whatsoever in the cause until the return day of the rule.

May 13 the Board answered the rule of May 3 stating that the record was incomplete because the Board had determined on May 3 to vacate the order and to restore the cause to the docket for further proceedings and had been prevented from so doing by the restraining order issued May 3; the answer further set out that the provisions of Section 10(d) of the National Labor Relations Act deprive the court of jurisdiction to issue the restraining order and of jurisdiction to forbid the vacation of the Board's order and to compel the filing of a transcript of the Board's record as it stood prior to the decision to vacate the order. The court made the rule absolute and enjoined the Board from taking any further steps or proceedings in the cause until the transcript was filed.

The petition of the National Labor Relations Board asserts that the court was without jurisdiction to take this action and prays a writ of mandamus directing the judges who participated to vacate the order of May 13 and a writ of prohibition against the exercise of jurisdiction upon the petition of Republic to set aside the order of April 8 without affording the Board a reasonable opportunity to vacate it.

Upon presentation of the papers we granted leave to file them and entered a rule upon the judges of the Circuit Court to show cause why the relief should not be granted as prayed, returnable May 23, and directed that, on the return day, the parties should be heard upon the question of the jurisdiction of the court to make the challenged order.

May 21, the judges filed their return admitting the allegations of the petition, except those as to the rules and practice of the Board, and its determination to vacate the orders in the Republic and other cases, which it neither admitted nor denied. The return showed that the order of May 13 was made in the view that, under Section 10(f) of the Act, Republic, by filing and serving its petition for relief, and by requesting the Board to file, or to deliver for filing, a certified transcript, complied with the jurisdictional requirements of the statute so far as was within Republic's power; that thereupon it became the duty of the Board forthwith to file a transcript and that, in the judges' opinion, jurisdiction of the court attached upon service of the petition for review and could not be defeated by the Board's [fol. 118] failure to perform its statutory duty, which was to file the transcript. The return further shows that the court was of opinion that possible damage would result to Republic from delay due to the failure to file the transcript and this consideration moved the court to a construction of the Act which called for the entry of its order. The return concludes as follows: "Recognizing the debatable character of the question presented on this record, the respondents submit themselves to the judgment of this court as to whether or not they had jurisdiction to enter the order complained of and record their readiness to vacate the same if, in the opinion of this court, jurisdiction of the cause was lacking."

As is indicated by our action on the motion of the Board for leave to file, and by the return to the rule, the question is solely of the jurisdiction of the Circuit Court of Appeals. This question is to be answered in the light of Section 10 (d) (e) and (f) of the National Labor Relations Act, the pertinent portions of which are in the margin.[2] Counsel for the

[2] "(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner

petitioner and for Republic have presented their views in oral argument and briefs.

The Board's proceedings are administrative in character. Its final action is subject to judicial review in the manner specified in the Act. Subsection (d) of Section 10, in plain terms, invests the Board with authority, at any time before the transcript shall have been filed in court, to modify or set aside its order in whole or in part. The purpose of the provision obviously is to afford an opportunity to correct errors or to consider new evidence which would render the order inadequate or unjust. The words used are "Until a transcript of the record * * * shall have been filed in a court, as hereinafter provided", the Board may vacate or modify. The following subsections, (e) and (f), are those to which we turn for the connotation of the qualifying phrase. Subsection (e) grants the Board resort to a court for the enforcement of its order. That enforcement is to be obtained by filing a petition for enforcement and filing a

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as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, * * *.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals * * * by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) * * *."

certified transcript of the Board's proceedings. The subsection proceeds: "Upon such filing, the court shall cause notice thereof to be served upon" the person against whom enforcement is asked. Here it is quite plain that the court is without jurisdiction to take action at the behest of the Board until the transcript shall have been filed and notice of the filing of the petition and the transcript has been served. Subsection (f) affords relief to "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," * * * Such a person, the statute declares, "may obtain a review" of the Board's order by filing in court "a written petition praying that the order of the Board be modified or set aside." A copy of the petition is to be served forthwith upon the Board, and "thereupon the aggrieved party shall file in the court a transcript" of the Board's proceedings. "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection [fol. 119] (e)," * * * Plainly the court may not proceed to review the Board's order under either section until a transcript is filed.

Counsel for Republic urge, in support of the Circuit Court's action, that the words, "as hereinafter provided", in subsection (d), refer to the filing of the transcript required in an enforcement proceeding initiated by the Board authorized by subsection (e) but cannot have reference to a proceeding for review initiated by any other party before the Board pursuant to subsection (f). The words of the statute do not warrant this construction. Two filings are required by subsection (f), the first of a petition, the second of a transcript. After prescribing the second, the Act provides that "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e)", * * * The reference clearly is to the filing of the transcript and not to the filing of the petition. The contention that the Act cannot be applied in accordance with its apparent intent is that, as only the Board can certify the proceedings, and the petitioner under subsection (f) must file the certified transcript, such a construction would enable the Board to hold the transcript for an indefinite period and thus harass and embarrass a litigant, and delay, and perhaps deny, any effective judicial review. No such case is here presented. We have no occasion to

determine what, if any, relief may be needed by or available to a party who has filed his petition for review where the Board does not desire to modify or set aside its order, but fails or refuses to furnish a transcript of its proceedings.

Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith. Since the statute empowers the Board, before the filing of a transcript, to vacate or modify its orders, certainly it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power. It is obvious that Congress intended to confer no jurisdiction upon the reviewing court to prevent the Board from seasonably vacating or modifying its order so as to make it comport with right and justice. The Act plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act once the transcript of the Board's proceedings is before it. It is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.

Counsel for Republic urges that the Board's petition to this court indicates that it does not intend irrevocably to abandon its former order but merely to regularize it and re-enter it after regularization and that the Act gives no power to do this after the Board has heard the case and issued an order. We have no occasion to speculate upon the future proceedings before the Board. It is enough that the petition shows that the Board desired to and would have vacated its order had it not been restrained by the action of the court. What the legal effect of its future proceedings may be we need not decide.

Counsel insist that Republic is aggrieved, within the meaning of subsection (f), by the Board's attempt to retain jurisdiction of the proceeding and take further steps in it. But the Act grants a review and relief only to a person aggrieved by an order of the Board and had the court not restrained the Board its order would have been vacated and

there now would be no order outstanding. The Board is given no power of enforcement. Compliance is not obligatory until the court, on petition of the Board or any party aggrieved, shall have entered a decree enforcing the order as made, or as modified by the court. Statutory authority to the Board to vacate its order prior to the filing of the transcript does not seem to us to differ materially from a like statutory authority to a master in chancery to modify or recall his report to a court after submission but before action by the court. No one could successfully claim to be aggrieved in a legal sense by such a statutory provision or assert that the legislature is incompetent to confer such power upon a master with consequent lack of jurisdiction in the court to forbid its exertion.

[fol. 120] The investiture of a court with jurisdiction to review an order on the merits only upon the filing of a transcript exhibiting the Board's final action is not a denial of due process as suggested by counsel.

We think the writs prayed are appropriate remedies in the circumstances disclosed.[3] The Circuit Court was without jurisdiction of the subject matter. If the Board had complied with the orders made, a hearing would have resulted respecting the legality of supposed action of the Board which was not in law or fact the final action, review of which the statute provides. No adequate remedy would be open to the Board by way of certiorari from the court's ultimate review of an order which the Board was authorized and desired to set aside.

The expression in the return of readiness to vacate the order entered in the Circuit Court, if this court is of opinion that the tribunal lacked jurisdiction, renders the present issue of process supererogatory. Should the order not be vacated and occasion thus arise for the award of process, the clerk may issue it upon the order of a Justice of this Court.

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[3] Compare Virginia v. Rives, 100 U. S. 313, 329; In re Rice, 155 U. S. 396, 402; In re New York & Porto Rico S. S. Co., 155 U. S. 523; In re Atlantic City Railroad, 164 U. S. 633; In re Winn, 213 U. S. 458, 466-468; Ex parte Harding, 219 U. S. 363, 377; Ex parte Oklahoma, 220 U. S. 191, 208; Ex parte Chicago, R. I. & P. Ry., 255 U. S. 273, 275.

Mr. Justice Stone and Mr. Justice Cardozo took no part in the consideration or decision of this case.

[fol. 121] J-205.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 21, Original

In the Matter of the Petition of the NATIONAL LABOR RELATIONS BOARD for a Writ of Prohibition and for a Writ of Mandamus.

(May 31, 1938)

Mr. Justice BUTLER, dissenting:

The case is not here as if on writ of certiorari or appeal for review of error alleged to have been committed by the lower court. This is an application for the writs of mandamus and prohibition to command and restrain action by the judges named. These may not be granted unless the lower court was plainly without jurisdiction to hear and determine the case or the particular issue. In re New York &c. Steamship Co., 155 U. S. 523, 531. Ex parte Oklahoma, 220 U. S. 191, 208. Ex parte Chicago, R. I. & Pac. Ry., 255 U. S. 273, 275. Precisely, the question is whether, on the facts here disclosed, the court was without power to consider and decide upon the corporation's application for an order directing the Board to certify and file a transcript of the record and restraining in the meantime any other action by it. The decision just announced answers affirmatively, and that is the basis on which the Court commands vacation of the order of the lower court and prohibits it from reviewing the order of the Board without first giving it a reasonable opportunity to vacate its order; that is, without giving the Board more time to proceed under Section 10 (d). Obviously jurisdiction of the circuit court of appeals attached upon the filing of the corporation's petition for review and service of a copy on the Board. Any other construction of Section 10 (f) would let the Board, by refusing to certify a transcript of proceedings before it, prevent judicial review of its orders. Congress did not so intend. While the statute expressly requires the person aggrieved to file a certified

transcript, it impliedly, but not less plainly, commands the Board to certify the record. This Court's decision rests on the statement that, as the term is to be applied in this instance, jurisdiction is the power to hear and determine the controversy presented in a given set of circumstances. If the lower court had jurisdiction to entertain and decide the corporation's motion, writs of mandamus and prohibition may not be granted, for they are not available for correction of mere error or even abuse of discretion. I. C. C. v. New York, N. H. & H. R. Co., 287 U. S. 178, 203-204. Ex parte Whitney, 13 Pet. 404, 408. Ex parte Taylor, 14 How. 3, 13. Ex parte Railway Co., 101 U. S. 711, 720. In re Hawkins, Petitioner, 147 U. S. 486, 490. In re Atlantic City Railroad, 164 U. S. 633, 635. In re James Pollitz, 206 U. S. 323, 331. Cf. Ex parte Simons, 247 U. S. 231, 240.

Stripped of unnecessary details and language, the circumstances under which the lower court made the challenged order may be stated briefly.

Upon charges made by the Steel Workers' Organizing Committee, the Board, July 15, 1937, issued complaint alleging that the corporation was engaging in unfair labor practices. The corporation joined issue. Before it filed answer, hearings were held by the Board, from July 21 to July 24. After answer, there were hearings before an examiner at various times and places between August 9 and September 27. April 8, 1938, the Board made its decision and order. It found the corporation guilty of practices denounced by the Act. It ordered it to cease and desist, to reinstate certain persons, to pay sufficient to equalize what [fol. 122] certain persons would have earned if employed by the corporation during specified periods, less the amount they earned at other work during those periods.

April 18, the corporation filed in the circuit court of appeals its petition to have the Board's order adjudged invalid. The petition charges that, in violation of the corporation's rights under the due process clause of the Fifth Amendment, the Board ordered the corporation to reinstate persons not alleged in the complaint to have been unlawfully discharged or discriminated against by the corporation; and so directed notwithstanding the corporation had never been accorded or offered a hearing or opportunity of making defense as to the asserted rights of those persons; that the Board made the order without affording the corporation

opportunity to present its case by argument, orally or upon brief. It alleges that, under the terms of the order, about five thousand persons may claim reinstatement, petitioner is required to reinstate or pay them as specified, the average wage is $6.50 per day. And it asserts that to defer reinstatement, pending decision by the court as to validity of the order, would involve a risk of such magnitude as imminently to threaten its right to have review in court. And the petition avers that unless the order be stayed, irreparable injury and loss will result to the corporation and that it will be denied review of a substantial part of the order. It prays service of a copy on the Board, certification by the Board of the transcript as required by law, invalidation of the order, direction to the Board to dismiss its complaint, and a stay of the order and of proceedings by the Board to enforce it, excepting such as may be taken in court.

April 18, the day on which the corporation filed petition for review, the Board, consistently with the corporation's claim as to its duty under the Act, agreed promptly to certify the transcript and to file it in court. April 22, the corporation filed an application for stay and temporary relief. Its application cited Section 10 (g), which declares that commencement of proceedings under Section 10 (f) shall not, unless specifically ordered by the court, operate as a stay of the Board's order. It stated: The purpose of the application was to prevent irreparable loss and denial of review. If, pending final determination of the case, petitioner should fail to make reinstatements in accordance with the order, its potential weekly liability would exceed $95,000. On that basis the corporation sought suspension of the portion of the order that relates to reinstatement or payment of wages, so that, if it should be upheld, the corporation's liability to reinstate or to pay would commence ten days after the final decree of the court. In a brief submitted in support of its motion, the corporation maintained that the order is invalid because the corporation was not afforded a fair and full hearing and because the order is one for re-employment and not for reinstatement; and that unless the stay be granted, the corporation will suffer irreparable financial losses.

April 30 the corporation's motion came on for hearing. The Board appeared and argued against it. The court neither granted nor denied the application. The rule to

show cause, issued May 3, recites that at the hearing, April 30, the Board stated that it "was seriously considering withdrawing, modifying or changing its order in the case and reopening same." The Board's application for vacation of that order states that at the hearing on April 30 the Board advised the court that it was contemplating vacating its order, and would advise the court of its final position not later than May 4, 1938; that, on May 3, it notified the corporation that it had definitely decided to vacate the order; but that, before any steps to do so could be taken, the court had issued the restraining order. The Board maintained that as the transcript had not been filed, Section 10 (d) was applicable and that the Board then had the right to withdraw or vacate the order.

In its answer to the rule to show cause, the Board says that it was not guilty of refusal to certify or of dilatory [fol. 123] tactics, and that on April 18 its counsel informed the corporation's counsel that the Board would as promptly as possible prepare the record for certification. "This task of considerable magnitude was forthwith commenced and was incomplete a week later when the supervening decision of the Supreme Court in Morgan v. United States (decided April 25, 1938) was rendered. * * * There is no question in this case, therefore, whether the court had jurisdiction to require the Board to file a record when such filing has been long delayed or refused by the Board. The Board has with all promptness elected to exercise its power to vacate its order under Section 10 (d), and there is no merit in petitioner's claim that that section is inapplicable because the Board has evaded its obligations under the Act."

In these circumstances the court did not lack jurisdiction to hear and determine the controversy presented by the corporation's application for an order directing the Board to certify the record for filing in court. The Act contemplates prompt action. Section 10 (i) declares that petitions filed under it shall be heard expeditiously "and if possible within ten days after they have been docketed." Power under Section 10 (d) to change or vacate its order does not enable the Board to delay filing the record. At the bar counsel expressed the opinion that the Board may vacate an order without notice, Section 10 (d). It had fifteen days, April 18 to May 3, to decide whether to vacate the order or join

issue. That period included a week before and a week after our decision in Morgan v. United States, supra. The Board does not claim that it needed until May 3 to certify the transcript. So the issue before the lower court was the very narrow one, whether for an unreasonable length of time the Board withheld the record. And that question involves consideration of subsidiary ones: To what extent, if at all, a certification may be delayed by the choice of the Board to enable it to consider modification or repeal of its order. Whether after decision in Morgan v. United States more than a reasonable time had elapsed. While there is room for difference of opinion on these questions, it is very hard to perceive on what ground it may be held that the court was without jurisdiction to decide them or even to conclude that the order was an arbitrary exertion of power, or that restraint against further delay by the Board involved an abuse of discretion.

I am of opinion that the lower court had jurisdiction of the case and of the issues decided by the challenged order, and that therefore the Board's application for writs of mandamus and prohibition should be denied.

Mr. Justice McReynolds concurs in this opinion.

[fol. 124] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION TO REMAND—Filed June 2, 1938

To Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company

Please Take Notice that on the 6th day of June, 1938, at 9 A. M. (E. S. T.), or as soon thereafter as counsel can be heard, the annexed motion to remand will be presented to

the United States Circuit Court of Appeals for the Sixth Circuit at the Federal Building, Covington, Kentucky.

Dated June 1, 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

Receipt of above notice acknowledged this 1st day of June 1938.

(Signed) Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 125] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION TO REMAND—Filed June 2, 1938

Comes now the National Labor Relations Board, respondent in the above-entitled cause, by its attorney, and shows as follows:

1. In the event that the Court denies the Board's motion, herewith filed, to vacate the Court's order of May 9, 1938, the case herein should be remanded to the Board for the completion of the proceedings properly initiated prior to the Court's order of May 9, and now pending before the Board, as shown in paragraphs 2 through 7 of the Board's said motion, to which the Court respectfully is referred. The certified transcript of the record on file in the Court is incomplete and does not show "the final action, review of which the statute provides" (In the Matter of the Petition of the National Labor Relations Board, decided by the Supreme Court, May 31, 1938), and is not the entire record upon which the Court may determine the case pursuant to Section 10 of the Act. The proper manner in which to remedy this situation, if the Board's motion to vacate the order of May 9 is denied, would be to remand the case to the Board for the completion of its proceedings and of the record thereof.

2. In addition to the completion of the proceedings pending before the Board and of the record thereof, the granting

of the motion herein would result in obviating upon the record certain questions sought to be raised by the Company concerning the validity of the Board's order, as more fully [fol. 126] appears in Exhibit A annexed to the Board's said motion to vacate. Should the instant motion be granted, the Board now advises the Court that it will forthwith set aside its findings and order of December 22, 1937, issue proposed findings to which the parties will be permitted to file exceptions, and if they so desire argue objections before the Board, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as may be deemed advisable. The Company may not now be heard to protest that the Board proposes to accord in full the very procedure of which the Company claims to have been deprived. Neither will the Company be heard to impute to the Board an intention to act perfunctorily. See In the Matter of the Petition of the National Labor Relations Board, supra. Cf. Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699, 701; Lehmann v. State Board of Public Accountancy, 263 U. S. 394, 398; Continental Baking Co. v. Woodring, 286 U. S. 352, 369. The official acts of public officers are supported by a presumption of regularity (United States v. Chemical Foundation, Inc., 272 U. S. 1, 14-15; United States v. Berry, 67 F (2d) 763, 764 (C. C. A. 6), cert. den. 292 U. S. 648) and the Court will assume that the granting of the motion herein would result in reconsideration of the case by the Board.

3. The granting of the motion herein would in no way prejudice the Company, which indeed seeks to have the Board's order set aside. In the Matter of the Petition of the National Labor Relations Board, supra. The Company's suggestion on oral argument of its motion on May 9, 1938, that the alleged errors of the Board under Morgan v. United States, decided April 25, 1938, now sought to be corrected by the Board, are so inextricably interwoven with other errors of the Board that no valid order can ever be entered upon this record, is palpably without merit and in any event the Court will not pass on any such question until the further proceedings are completed. In the Matter of the Petition of the National Labor Relations Board, supra. The Com- [fol. 127] pany's own confidence in the validity of its suggestion is negatived by its resistance to the Board's pro-

posals for further proceedings. Since the Board is proposing to accord the Company what it complains to have been deprived of, the Company should be estopped to assert that it will be prejudiced by the granting of this motion and clearly it will not be prejudiced.

Wherefore the Board, by its attorney, in the event that the Court denies the Board's motion filed herewith to vacate the Court's order of May 9, 1938, moves this Honorable Court to issue an order remanding the case to the Board for further proceedings.

Dated, Washington, D. C., this 1st day of June 1938.

Robert B. Watts, Acting General Counsel, National Labor Relations Board.

[fol. 128] *Duly sworn to by Robert B. Watts. Jurat omitted in printing.*

[fol. 129] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

NOTICE OF MOTION—Filed June 6, 1938

Please Take Notice that the annexed motion for leave to amend the petition of Ford Motor Company, filed herein May 4, 1938, for a review of and to set aside an order of the National Labor Relations Board, and the proposed order thereon, will be presented to the United States Circuit Court of Appeals for the Sixth Circuit, Federal Building in the City of Covington, Kentucky, on the 8th day of June, 1938, at 9 o'clock (Eastern Standard Time) in the forenoon of that day, or as soon thereafter as it may be presented.

Dated, June 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Petitioner, Ford Motor Company.

Receipt of the above notice together with a copy of the annexed motion on the 4th day of June, 1938, is hereby [fol. 130] acknowledged.

Robert B. Watts, Attorneys for National Labor Relations Board.

[fol. 131] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

MOTION FOR LEAVE TO AMEND PETITION FOR A REVIEW OF AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed June 6, 1938

Now Comes Ford Motor Company, petitioner in the above-entitled cause, by its attorneys, and moves this Court for leave to amend its petition filed herein May 4, 1938, for a review of and to set aside an order of the National Labor Relations Board by inserting a new paragraph numbered 48-a between paragraphs 48 and 49 of said petition, as follows:

48-a. Said order and each and every part thereof is invalid and void because neither the Board nor the members thereof were impartial triers of the facts in making the decision upon the complaint against petitioner, in that at the time the Board considered and determined the complaint against petitioner the Board and the members thereof possessed a fixed bias and entertained a fixed prejudice against employers in general and possessed a fixed bias and entertained a fixed prejudice in favor of unions and [fol. 132] union activities, unlawful as well as lawful, and further in that said Board and the members thereof possessed a fixed bias and entertained a fixed prejudice against petitioner, and further in that it was the settled practice of the Board and the members thereof to regard the issuance of a complaint against an employer as proof of the commission of unfair practices, and so regarded the complaint against petitioner.

and by striking out paragraph 38 of said petition and inserting in lieu thereof a new paragraph 38, as follows:

"38. Petitioner was without knowledge of the matters alleged in paragraphs 7, 21 to 34, inclusive, 35, 35-a, 35-b, 35-c, 36, 37, 39, 40, 46, 47, 48, 48-a and 68 hereof until after January 8, 1938, when, by virtue of the Board having on January 7, 1938, filed in this Court its petition to enforce said order and a certified transcript of the record in the proceedings before the Board and by virtue of the Court having caused notice of such filing to be served upon petitioner on January 8, 1938, the Board had lost all jurisdiction of the proceedings in which said purported order was purported to be made and this Court had acquired complete, plenary and exclusive jurisdiction of the proceeding and the questions determined therein.

and by adding to said petition a new paragraph 68 as follows:

68. By reason of the manner in which the Board considered and determined the case before it, petitioner was deprived of a full, fair and open hearing in violation of the National Labor Relations Act and of the due process [fol. 133] clause in the Fifth Amendment to the Constitution of the United States.

Dated June 3, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Petitioner.

[fol. 134] *Duly sworn to by Frederick H. Wood. Jurat omitted in printing.*

[fol. 135] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FORD MOTOR COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Before Hicks, Simons and Allen, Circuit Judges

ORDER GRANTING MOTION TO REMAND, ETC.—Filed June 10, 1938

In this cause It Is Ordered that—

(1) The objections of respondent filed May 21, 1938, to the interrogatories propounded by petitioner and filed May 12, 1938, be and are sustained and the interrogatories are stricken from the record.

(2) The petition filed by petitioner on May 19, 1938, for a commission to take depositions of witnesses is denied.

(3) The motion of petitioner filed June 4, 1938, for a judgment pro confesso or in the alternative to compel respondent to answer the petition or to treat the petition as denied by respondent, is overruled and denied.

(4) The motion filed by petitioner on May 19, 1938, to amend its petition for review is denied.

(5) The motion of petitioner filed June 6, 1938, for leave to amend its petition for review is denied.

(6) The motion of respondent filed June 2, 1938, to vacate the order of May 9, 1938, directing that the transcript filed in cause No. 7919 should be treated as filed in this cause is denied.

(7) The motion of respondent filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of De-
[fol. 136] cember 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted. But this order to remand is stayed for thirty days from this date pending application to the Supreme Court for a writ of certiorari; Provided

That, if within such period the applicant shall file with the clerk of this court a certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until final disposition by the Supreme Court.

(8) The application of petitioner to be heard in oral argument upon the motions and matters herein determined is denied.

Approved for entry.

Xen Hicks, Circuit Judge.

[fol. 137] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8019

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 18, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, petitioner hereby indicates the following portions of the record to be incorporated into a transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari and requests that such transcript and the transcript of record designated by the praecipe filed simultaneously herewith in case No. 7919 be consolidated physically and certified together and that such consolidated transcript be delivered to the undersigned, counsel for petitioner.

1. Petition for a review of and to set aside an order of the National Labor Relations Board, filed May 4, 1938.

2. Motion of petitioner to compel the National Labor Relations Board to furnish certified transcript of record and [fol. 138] for temporary injunction and affidavit of Frederick H. Wood in support thereof, filed May 5, 1938.

3. Order, dated May 9, 1938, with regard to certified transcript of record of proceedings before the National Labor Relations Board.

4. Motion of petitioner for leave to amend petition for a review of and to set aside order, filed May 19, 1938.

5. Motion of petitioner for leave to amend petition for a review of and to set aside order, filed June 6, 1938.

6. Motion of respondent to vacate order of May 9, 1938, filed June 2, 1938.

7. Motion of respondent to remand cause, filed June 2, 1938.

8. Order, dated June 10, 1938.

9. This praecipe of petitioner for transcript of record.

Dated, June 17, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company, Petitioner.

Receipt of a copy of the above praecipe superseding a similar praecipe of even date hereby acknowledged this 17th day of June, 1938.

Robert B. Watts, Acting General Counsel, N. L. R. B.

[fol. 139] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8019

[Title omitted]

PRAECIPE FOR ADDITIONAL PORTIONS FOR TRANSCRIPT OF RECORD—Filed June 24, 1938

To John W. Menzies, Esq., Clerk of the United States Circuit Court of Appeals for the Sixth Circuit:

Pursuant to Rules 10 and 44 of the Supreme Court of the United States, respondent hereby indicates the ollowing additional portions of the record to be incorporated into the transcript of record to be used upon petition to the Supreme Court of the United States for writ of certiorari.

1. Motion of petitioner to consolidate causes, filed May 4, 1938.

2. Opposition of respondent to motion to consolidate causes and to motion to compel certification of transcript of record and for a temporary injunction, filed May 9, 1938.

3. Opposition of respondent to motion for leave to amend petition for review, filed on or about May 23, 1938.

4. This praecipe of petitioner for additional portions for transcript of record.

Dated: June 22, 1938.

Robert B. Watts, Acting General Counsel National Labor Relations Board.

Receipt of a copy of the above praecipe hereby acknowledged this 22d day of June, 1938.

Frederick H. Wood, Alfred McCormack, Louis J. Colombo, Cravath, de Gersdorff, Swaine & Wood, Attorneys for Ford Motor Company.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 141] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 182

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted and the case is assigned for argument on Monday, November 7, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 142] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 183

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument on Monday, November 7, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 7 1938
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 182

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

FREDERICK H. WOOD,
LOUIS J. COLOMBO,
ALFRED MCCORMACK,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1938.

FORD MOTOR COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD	No. 182
FORD MOTOR COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD	No. 183

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, FORD MOTOR COMPANY, respectfully prays:

(1) For a writ of certiorari in No. 182 to the United States Circuit Court of Appeals for the Sixth Circuit to review [redacted] an order of that Court

entered May 5, 1938 (R. 51), granting to the National Labor Relations Board (hereinafter sometimes called "the Board") leave to withdraw, without prejudice, a petition (R. 1) of the Board for the enforcement of an order of the Board against petitioner; and

(2) For a writ of certiorari to review an order of said Court (R. 108) in No. 183 entered on June 10, 1938, remanding to the Board a cause instituted in said Court by petitioner to review and set aside the said order of the Board (R. 62).

Review of the orders of the Court below is thus sought in two cases: (1) a case brought by the Board to enforce its order (hereinafter sometimes called "the Board's case"), and (2) a case brought by petitioner to set aside the Board's order (hereinafter sometimes called "the petitioner's case").

The subject-matter of the two cases is the same, to wit, the Board's order, and the records in both have been printed together by the Clerk of this Court. The cases are so closely related that for a full understanding of either reference to the record in the other is necessary, and it seems probable, if not certain, that in considering each the Court below took judicial notice of the record in the other. For these reasons and because the two cases present similar and closely related, if not substantially the same, questions, the prayer for a writ in each case is made by a single petition.

SHORT AND SUMMARY STATEMENT OF THE MATTER INVOLVED AND OF THE QUESTIONS PRESENTED

The questions presented involve an interpretation of paragraphs (d), (e) and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. §§ 151-166). Said paragraphs are set forth as an appendix to this petition. (See pp. 28-30, post)

1. The Board filed with the Court below its petition (R. 1) to enforce an order made against the petitioner and a certified transcript of record of the proceedings before the Board (R. 6). The jurisdiction of the Court was thus complete. *National Labor Relations Act*, Sec. 10(e); *In re Petition of National Labor Relations Board*, decided by this Court, May 31, 1938. The petitioner, although not required so to do by the Act, filed an answer (R. 9) alleging that the Board's order and each and every part thereof was invalid upon the grounds set forth in the answer and praying that the Board's order be "set aside" (R. 21). Thereafter on motion by the Board (R. 36) the Court below made an order granting leave to the Board to withdraw its petition (R. 51),[1] thus in effect granting leave to the Board voluntarily to discontinue its suit.

Section 10(e) of the National Labor Relations Act provides that upon the filing of a petition by the Board to enforce an order made by it and of a transcript of the record in the proceedings before the Board

---

[1]So much of said order, made on May 5, 1938, as gave the Board leave to withdraw the transcript of record as well as its petition was vacated by the Court on May 9, 1938 (R. 54). The Board did not actually purport to avail itself of the leave thus granted until June 2, 1938, when it filed its "withdrawal of petition" (R. 55).

> "the court * * * shall have jurisdiction of the proceeding and of the question determined therein * * * and shall have power * * * to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

No answer is required to be filed. The Act thus provides that if, in a suit brought by the Board to enforce its order, the Court shall be of the opinion that the order is invalid, the Court shall enter a decree setting it aside, without answer or cross-bill by the respondent employer.

Conversely, Section 10(f) provides that if, in a suit by "any person aggrieved" by an order of the Board to modify or "set aside" the order, the court shall be of the opinion that the order is valid, it shall enter a decree "enforcing the order", without answer or cross-bill by the Board.

The Act thus expressly provides for affirmative relief to the respondent in proceedings had to review an order of the Board, if such respondent prevails, whether the suit be one by the Board to enforce or by the "aggrieved party" to set aside. If the Board sues to enforce its order, the employer is entitled to a decree setting the order aside, if found by the Court to be invalid, and not merely to a dismissal of the Board's petition to enforce. Conversely, if the "aggrieved party" sues to set the order aside, the Board is entitled to affirmative relief in the form of a decree of enforcement, if the order is held to be valid, and not merely to a dismissal of the suit to set aside.

The following question is thus presented:

Under the National Labor Relations Act, which provides for an affirmative decree in behalf of a successful

respondent in a suit to review an order of the Board, whether prayed for by the respondent or not, and whether the suit be begun by petition of the Board to enforce or by petition of the "aggrieved party" to set aside, may the court permit the petitioner in such suit to withdraw or voluntarily discontinue the same, without prejudice, and without the consent and over the opposition of the respondent?[2]

2. While the Board's case was pending in the Court below, the petitioner filed its petition to review and set aside the order of the Board (R. 62). The transcript of the proceedings before the Board was filed by order of the Court in the petitioner's case (R. 80). The jurisdiction of the Court was thus complete and exclusive (Section 10(e) and (f)). *In re Petition of National Labor Relations Board*, decided by this Court, May 31, 1938. Thereafter, on motion of the Board (R. 103), the Court entered an order (R. 108) remanding the case to the Board for further proceedings before it.[3] This was done without any determination that the order of the Board was invalid, without any determination as to the necessity or propriety of further action by the Board, and without setting aside the order of the Board.

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[2]The precise question presented in this case is whether the Court had power to grant the Board's motion for leave to withdraw or discontinue its suit, without prejudice. It seems clear, however, that if the Board is entitled to withdraw or discontinue without prejudice a suit instituted by it to enforce its order, the party against whom the order is made would have the right to withdraw or discontinue, without the consent and over the opposition of the Board, a suit brought by such party to set the order aside. This is so because, in either case, if the respondent in the suit prevails, it is entitled to an affirmative decree.

[3]The Board neither answered nor moved to dismiss either for lack of jurisdiction in the court or because the petition failed to state a cause of action or for any other reason.

The Act provides that the "jurisdiction of the court shall be exclusive". Section 10(e) and (f). It contains no provision whereby, after the jurisdiction of the court has attached, it may divest itself of jurisdiction by remanding the case to the Board upon the motion of either party. The only provision which the Act contains for further proceedings before the Board is that which empowers the court to enter an order directing that additional evidence be taken before the Board at the instance of either party upon a showing satisfactory to the court. Section 10(e). In such event, the case is not "remanded" to the Board, and the Board is not empowered to set aside or modify its order, but only to "file its recommendations, if any, for the modification or setting aside of its original order" by reason of the new evidence so taken. Section 10(e).

Upon the facts stated, the following question of law is thus presented:

Under the National Labor Relations Act, which contains no provision whereby after the jurisdiction of the court has attached the court may divest itself thereof, may the court, upon motion either of the Board or of the party aggrieved by its order, divest itself of jurisdiction by remanding the case to the Board for further proceedings?

3. The avowed purpose of the Board's motion to remand (R. 103) was to permit the Board to set aside the order which was the subject-matter of the petitioner's suit, and after further proceedings, to enter a new one. The necessary and intended effect of the Board's motion and of the Court's order thereon was to put an end to the subject-matter of the petitioner's suit and hence was equiva-

lent to an order of dismissal at the instance of the respondent, which had not moved to dismiss either for lack of jurisdiction or for failure to state a cause of action.

Upon the facts stated, the following question of law is presented:

Under the National Labor Relations Act, may the Court, after its jurisdiction has attached in a proceeding to set aside an order of the Board, enter an order upon motion of the Board, over petitioner's opposition, the effect of which is to order that the petitioner's case be dismissed, otherwise than in response to a motion to dismiss either for lack of jurisdiction or failure to state a cause of action?

4. Petitioner's answer in the Board's case alleged that the order was void, *inter alia,* for failure to accord to the petitioner that "full, fair and open" hearing required both by the Act and by the due process clause (R. 11-17). Its petition to set aside the Board's order in the suit instituted by petitioner contained similar allegations (R. 66-72). It affirmatively appears both from the Board's motion to withdraw its own case (R. 37) and its motion to remand the petitioner's case (R. 104) that both were made for the purpose of enabling the Board to conform its procedure (we believe only superficially) to the requirements of the recent decision of this Court in *Morgan* v. *United States,* No. 581, decided April 25, 1938, rehearing denied May 31, 1938. In neither motion did the Board confess that its procedure was in conflict with the principles of law laid down in that case. It asserted in both, however, that it desired to obviate questions and issues raised by that deci-

sion.[4] The purpose of the Board in each motion, therefore, was to become revested with jurisdiction for the purpose of taking further proceedings to correct, or pretend to correct, actual or possible errors by reason of which its outstanding order might be held to be invalid.

The following question, therefore, common to both cases, is presented:

Under the National Labor Relations Act, under which the jurisdiction of the Court is exclusive, and under which, after the jurisdiction of the Court has attached, it is required to proceed to a decree either enforcing or setting aside the order, may the Court, in the absence of any provision permitting it so to do, divest itself of jurisdiction and surrender the same to the Board for the purpose of giving to the Board the opportunity to correct actual or possible errors committed by it, either of law or of fact?

5. The following question would also seem to be common to both cases:

In a proceeding in a Circuit Court of Appeals brought under the National Labor Relations Act, may the Court, after its jurisdiction has once attached, divest itself of such

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[4] In the motion to remand petitioner's case, it was stated that the granting of the motion "would result in obviating upon the record certain questions" arising under the *Morgan* case (R. 103-104). In the Board's motion to withdraw its own case, it said (R. 37-38):

> "The Board makes the motion herein without conceding in any respect that the supervening decision of the Supreme Court in the *Morgan* case would apply to the Board's procedure in the case herein under the Act and the Rules and Regulations of the Board, or that any such question is properly presented for consideration by the Court. The purpose of this motion is to eliminate certain issues as to the validity of the Board's procedure in this case. * * * In this manner questions concerning the validity of the Board's procedure will be obviated on the transcript of record, if one is later certified to the Court."

jurisdiction and remand the case to the Board for further proceedings of any description, or is its power to permit further proceedings to be had before the Board limited to the express power granted to the Court to entertain a petition by either party for leave to adduce additional testimony and grant the same for good cause showit, in which case the Board does not become revested with jurisdiction, and acquires no authority to modify or set aside its order, but only to make and file with the Clerk "its recommendations, if any, for the modification or setting aside of its original order" upon the basis of such modified or new findings of fact as the Board may make by reason of the new evidence thus adduced?

REASONS WHY THE WRITS SHOULD BE GRANTED

1. In entering its order in the Board's case granting to the Board leave to withdraw its petition to enforce its order, without the consent and over the objection of the respondent Company, which—if the Court had proceeded to a determination of the issues and had decided them in favor of the respondent Company—under the express provision of the Act would have been entitled to the entry of a decree setting the order aside, and not merely to a dismissal of the Board's case, the Court below decided an important question of Federal law which has not been, but should be, settled by this Court.

2. In granting leave to the Board to withdraw its petition to enforce its order in the face of the express provision of the Act and of the Company's prayer for affirmative relief contained in its answer, the Court below acted in probable conflict with decisions of this Court and with decisions

of other inferior Federal courts. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *City of Detroit* v. *Detroit City Railway Co.*, 55 Fed. 569.

3. In granting the Board's motion to withdraw its petition in its case, the Court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Cases *supra;* National Labor Relations Act, Sec. 10(e) and (f).

4. In entering its order in the petitioner's case, remanding the case to the Board for further proceedings, the court below decided an important question of Federal law which has not been but which should be settled by this Court.

5. By granting, in the petitioner's case, the Board's motion to remand the case to the Board for the purpose of permitting the Board to set its order aside and enter a new one (thereby in effect ordering petitioner's case to be dismissed on motion of the respondent Board, and in the absence of a motion by it to dismiss either for lack of jurisdiction or failure to state a cause of action) the Court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

6. In remanding the case to the Board without itself first setting aside the Board's order, the Court acted in a way in probable conflict with the decisions of this Court (*Duke Power Company* v. *Greenwood County*, 299 U. S. 259; *Willing* v. *Binenstock*, 302 U. S. 272; *Interstate Circuit* v. *United States*, decided by this Court on April 25, 1938); and so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. In divesting itself of jurisdiction after it had attached, and in surrendering jurisdiction to the Board by granting the Board's motion for leave to withdraw its petition in its case, and by granting the Board's motion to remand in petitioner's case, the Court below acted in probable conflict with the decision of this Court in *In re Petition of National Labor Relations Board*, decided May 31, 1938, as well as without any express statutory authority, and in probable excess of its powers.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued in each of the above-named causes under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, City of Covington, Kentucky, commanding said Court to certify and send to this Court on a day to be designated, a transcript of the record and all proceedings had in each of said causes, to the end that each of the two orders referred to at pages 1 and 2 hereof may be reviewed and determined by this Court; that said orders and each of them may be set aside and reversed, and that petitioner be granted such other and further relief as may be just and proper.

Dated, New York, N. Y., July 6, 1938.

FREDERICK H. WOOD,
ALFRED MCCORMACK,
LOUIS J. COLOMBO,
Attorneys for Ford Motor Company, Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

THE CASE BELOW

The case below is unreported and the orders sought to be reviewed, entered May 5, 1938, and June 10, 1938, respectively, were entered without opinion (R. 51, 108).

JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347(a)).

The order of the Court below granting the Board leave to withdraw its petition in its case, followed by its withdrawal, put an end to that case. By its order remanding the petitioner's case to the Board for the purpose of permitting the Board to set aside its order and make a new one, the Court surrendered its jurisdiction to the Board. Such order was thus the equivalent of an order dismissing petitioner's case on the motion of the Board. Both orders, having the effect of finally disposing of the case in which made, were final. *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92; *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284 (C. C. A. 5th); *Iowa-Nebraska Light & Power Co.* v. *Daniels*, 63 Fed. (2d) 322 (C. C. A. 8th); *Massachusetts Fire and Marine Ins. Co.* v. *Schmick*, 58 Fed. (2d) 130 (C. C. A. 8th).

Moreover, even if interlocutory, they may be reviewed on certiorari. *Gay* v. *Ruff*, 292 U. S. 25; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Forsythe* v. *Hammond*, 166 U. S. 506.

STATEMENT

The pertinent facts in both cases are adequately stated in the foregoing petition; in the Board's case (No. 182 in this Court) at pages 3-5, and in the petitioner's case (No. 183 in this Court), at pages 5-6.

SPECIFICATION OF ERRORS

The errors which petitioner will urge, if the writs of certiorari be granted, are that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In permitting the National Labor Relations Board, over petitioner's objection, to withdraw without prejudice its petition for enforcement of its order against petitioner.

2. In remanding petitioner's case to the National Labor Relations Board for further proceedings.

3. In remanding petitioner's case to the National Labor Relations Board for further proceedings without advice, direction or determination as to the law to be observed by the Board in such further proceedings.

4. In remanding petitioner's case to the National Labor Relations Board without any determination that the order of the Board was invalid, or as to the necessity or propriety of further action by the Board, and without setting aside its order.

5. In refusing to vacate its order permitting the National Labor Relations Board to withdraw without prejudice its petition for enforcement.

6. In failing and refusing, over the objection of petitioner, to proceed to a decree in the Board's case.

7. In failing and refusing, over the objection of petitioner, to proceed to a decree in the petitioner's case.

V

THE COURT SHOULD GRANT CERTIORARI IN ORDER TO AVOID THE CONFUSION WHICH WOULD OTHERWISE RESULT.

Unless the writs be granted, the Board, if it pursues its announced intention, will set its order aside, conduct such further proceedings as it chooses, and then enter a new order. If, as we believe, the Court erred in entering the orders sought to be reviewed, all such further proceedings will be a nullity, and any new order predicated either in whole or in part thereon will be void. This will be the result if the Court erred in either case. This is so because, if it erred in either, exclusive jurisdiction is still in the Court.

If, therefore, certiorari should be denied, and a new order entered, all of the questions presented by this application would necessarily be involved in a new suit to review the Board's order.

Moreover, it would be difficult, if not impossible, to determine from the new decision and order of the Board to what extent its order was predicated upon the proceedings previously had and those subsequently taken. The resulting confusion affords an additional reason why the writs should be granted.

The questions presented are not only of peculiar importance as a guide for the further conduct of this case, both by the Board and by the Court below. It is equally or more important that this Court determine the broad question of whether a Circuit Court of Appeals which has once acquired jurisdiction over a proceeding to review an order of an

administrative tribunal may, without statutory authority so to do, divest itself of such jurisdiction and surrender the same to the administrative tribunal for the purpose of permitting it or the party against which its order is made to "obviate" or "eliminate" by further proceedings before it issues raised by the pleadings in the case before the Court. The action of the Court below, if validly taken, constitutes a precedent which should be sanctioned by this Court. If invalidly taken, it should be set aside by this Court to avoid its repetition by the Court below or others, by an authoritative settlement and determination by this Court of the important Federal question necessarily determined by the Court below in entering the orders sought to be reviewed.

It is respectfully submitted that the writs in both cases should be granted.

FREDERICK H. WOOD,
LOUIS J. COLOMBO,
ALFRED MCCORMACK,
Attorneys for Petitioner.

ARGUMENT

I

AT THE TIME OF THE ENTRY OF BOTH ORDERS SOUGHT TO BE REVIEWED THE JURISDICTION OF THE COURT WAS COMPLETE AND EXCLUSIVE.

When the Court entered its order granting leave to the Board to withdraw its petition in its case, a certified transcript of the record before the Board, as well as the Board's petition to enforce, was on file in the Court below (R. 6, 8). Similarly, when the Court entered its order remanding petitioner's case to the Board, a certified transcript of the record before the Board, as well as petitioner's petition to review and set aside the order of the Board, were on file in the court below (R. 80).

The jurisdiction of the Court was thus complete and exclusive at the time that the orders sought to be reviewed in either case were entered (*National Labor Relations Act*, Section 10(e) and (f); *In re Petition of National Labor Relations Board*, decided by this Court May 31, 1938).

II

FOR EACH AND ALL OF THE REASONS STATED IN THE PETITION A WRIT OF CERTIORARI SHOULD BE ISSUED IN THE BOARD'S CASE, NO. 182 IN THIS COURT.

It is well settled that a plaintiff may not discontinue his suit over the objection of the defendant, if the defendant has become entitled to affirmative relief. *Ex parte Skin-*

ner & Eddy Corp., 265 U. S. 86, at page 93; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *City of Detroit* v. *Detroit City Railway Co.*, 55 Fed. 569. This rule applies to petitioner's situation because it became entitled to affirmative relief by the express provisions of the Act upon the filing of the Board's petition to enforce and also by reason of the filing of its answer demanding affirmative relief.

In expressly providing that, in a suit arising under the Act, the court should enter an affirmative decree in favor of a successful respondent, the Congress must be assumed to have been familiar with the rule of law established by the cases above cited. *Cf. Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, 334-336; *United States* v. *Farrar*, 281 U. S. 624, 634; *Schall* v. *Camors*, 251 U. S. 239, 250-251.

But it is unnecessary to invoke the rule of the cases last cited. The Act is plain and unambiguous. The duty of the Court to proceed to an affirmative decree, in behalf of one party or the other, once its jurisdiction is complete, is imposed in express terms. It may not thereafter surrender jurisdiction to the Board at the instance of either party. No such power is conferred. None may be implied. Had Congress intended that, despite the plain provisions of the Act and the recognized rule of procedure where affirmative relief is sought by the respondent, the petitioner might, without prejudice, voluntarily dismiss its petition, it would have so provided. Had it intended to confer power upon the Court, within its discretion, to permit the discontinuance or withdrawal, without prejudice, of the suit by petitioner, it would have conferred such power upon the Court. On the contrary, the Act provides by its ex-

press terms, without limitation, that once the Court has acquired jurisdiction it shall proceed to a final decree in conformity with the prayer of the petition, if the petitioner shall prevail, and shall grant affirmative relief to the respondent if the respondent shall prevail.

It is believed that in granting the Board's motion for leave to withdraw its suit, without prejudice, the court below erred and acted in excess of its powers. In any event, in so doing it decided an important question of Federal law, which should be determined by this Court. In so doing it is also believed that it acted in probable conflict with the decision of this Court in *In re Petition of National Labor Relations Board, supra*, and departed from the accepted and usual course of judicial proceedings. For each and all of these reasons a writ of certiorari should issue in the Board's case, No. 182, in this Court.

III

FOR EACH AND ALL OF THE REASONS STATED IN THE PETITION A WRIT OF CERTIORARI SHOULD ISSUE IN THE PETITIONER'S CASE, NO. 183 IN THIS COURT.

By granting the Board's motion to remand the petitioner's case to the Board, the Court divested itself of jurisdiction and surrendered the same to the Board.

As pointed out in our statement of the questions presented, the Act does not in express terms authorize the Court so to do (p. 4, *ante*).

No such power may be implied. On the contrary, the Act contemplates that the Court, once its jurisdiction has

attached, shall proceed to an affirmative decree in favor of one party or the other.

The only provision which the Act contains, whereby further proceedings may be had before the Board, is the provision for the taking of additional evidence before the Board, for good cause shown to the court. Even in this connection, however, power in the Board to set aside its order and make a new one is expressly withheld. Its authority is confined to the filing with the court of "its recommendation, if any, for the modification or setting aside of its original order", by reason of such additional evidence (Section 10(e)). Power to modify or set aside remains exclusively with the court. By thus limiting the powers of the Court and Board, the Act clearly negatives the existence of any power in the Court to remand the case to the Board for any reason and also clearly negatives the asserted power of the Board to set aside its own order after a court has acquired jurisdiction, and after further proceedings, nowhere provided for in the Act, to make a new order.

Nor may it be argued that such power is inherent in the Court and may be exercised without express authority. A constitutional Federal Court, upon which jurisdiction has been conferred to review the orders of an administrative tribunal, does not sit as a supervisory administrative tribunal. *Cf. Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. It is without authority either to give directions to such a tribunal or surrender its jurisdiction thereto. *Cf. Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 278. Even when sitting in a purely appellate capacity to review the orders or decrees of a District Court, to which it may remand cases and to which it may give direc-

tions, a Circuit Court of Appeals may not remand a case to the District Court, with either direction or permission to take further proceedings, and thereafter enter a new decree, if it sees fit, *without itself first setting aside the decree or order appealed from. Duke Power Company* v. *Greenwood County*, 299 U. S. 259, 268. Much less may it, without specific statutory authority, surrender its jurisdiction to an administrative tribunal and thus escape performance of the judicial function imposed upon it. It is concerned only with the validity of the order before it. If valid, it is required to enforce it; if invalid, to set it aside.[1] In the latter event it is not concerned with such further steps, if any, as the administrative officer or tribunal can or may take. It is possessed of no power to remand for the purpose of permitting such officer or tribunal to "validate" its order (*Cf.* decision of this Court, denying petition for rehearing in *Morgan* v. *United States*, No. 581, decided May 31, 1938). It is equally without power to divest itself of jurisdiction for the purpose of permitting such tribunal to take further proceedings for the purpose of "obviating" or "eliminating" questions or issues, by reason of which the order attacked might be held invalid if the Court should proceed to determine them. Only by express grant may such power be exercised by a court which has acquired jurisdiction to determine the validity of an order of an administrative tribunal, and which has the duty, under the statute, to determine the same.

Finally, considering the avowed purpose of the Board itself to set aside its order and make a new one if its motion

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[1]The Court in this case did not set the Board's order aside but washed its hands of the case and surrendered jurisdiction to the Board without determining either the validity of the Board's previous action or laying down any rule to govern the Board's future action.

to remand should be granted, the effect of the Court's order remanding the case is equivalent to an order dismissing the case at the instance of the respondent and over the opposition of the petitioner. As we have already pointed out, a plaintiff, according to the established usages of judicial proceedings, may not be permitted to discontinue his suit without prejudice where the defendant has prayed for affirmative relief. Even more extraordinary is the theory, implicit in the action of the Court below, that a court, upon motion of a defendant, may order the plaintiff's case to be discontinued or dismissed, except upon a motion to dismiss for lack of jurisdiction, for failure to state a cause of action, or upon some other kindred ground.

It is respectfully submitted that in granting the Board's motion to remand petitioner's case the Court erred and exceeded its powers. In any event it decided an important question of Federal law which should be settled by this Court, and so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

IV

THE COURT, HAVING ONCE ACQUIRED JURISDICTION, COULD NOT DIVEST ITSELF THEREOF AND SURRENDER JURISDICTION TO THE BOARD MERELY UPON ITS ASSERTION OF AN INTENTION TO TAKE FURTHER ACTION IN THE PROCEEDING TO CORRECT ERRORS OF LAW OR FACT.

Both of the Board's motions had a common object, *i.e.*, to avoid the determination of certain of the issues raised by the petitioner in its answer in the Board's case and by its

petition to set aside in its own case; issues predicated upon the decision of this Court in *Morgan* v. *United States, supra*. In its motion papers the Board did not confess or admit that its procedure was in conflict with the principles laid down in either the first or second opinions of this Court in that case. Its motion was predicated upon an asserted desire to "obviate" or "eliminate" such issues, by itself setting aside the order and conducting further proceedings with a view to entering a new order. Had it by answer, motion or otherwise confessed the invalidity of its order by reason of failure to accord to the petitioner that full, fair and open hearing required by law, petitioner would have been entitled to a decree setting aside the order. Whether upon the entry of such an order the Board could correct any of its errors by further action in the proceeding wherein the present order was made would depend upon the provisions contained in the decree and the legal effect thereof.

The purpose of both of the Board's motions was to permit it to attempt or in form to attempt to mend its fences and patch up its record by persuading the Court to divest itself of jurisdiction and to surrender the same to the Board. As we have seen, the Act confers upon the Court no such power. It does not contemplate that the Court may divest itself of jurisdiction for the purpose of permitting the Board to correct errors which it may have committed, either of law or of fact, any more than it contemplates that the Court may divest itself of jurisdiction for the purpose of permitting the party against which the order has been made to patch up his record.

The Board may set aside and modify its order in order to reopen the proceedings, at any time before the jurisdic-

tion of the Court to review the validity of its order attaches, but not after. Sec. 10(d); *In re Petition of National Labor Relations Board, supra.* Nor does the Act confer upon the Court, within its discretion, power to surrender jurisdiction to the Board in order that it may correct errors previously committed and thereby validate an order otherwise void.

In this particular case the Board requested the Court to divest itself of jurisdiction and remand the case to the Board for the purpose of permitting the Board to set aside its own order, and, after taking further proceedings in compliance or pretended compliance with the decision of this Court in *Morgan* v. *United States,* enter a new order. Failure to accord to the respondent in a proceeding before an administrative tribunal that "full, fair and open" hearing which the law requires, is not the only ground upon which an order of such a tribunal may be set aside. As said by this Court in *Morgan* v. *United States,* 298 U. S. 468, 480:

> "There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & Southern Ry. Co., supra.* Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order."

It will scarcely be contended that if in a petition to set aside an order of the Board it was alleged that the order was

invalid upon any or all of the grounds stated, the Court, upon motion of the Board, could, instead of determining the issues thus raised, divest itself of jurisdiction and remand the case to the Board for the purpose of taking further proceedings and entering a new order in order to "obviate" or "eliminate" such issues.

Assume, for example, a case in which the petition alleges the order to be invalid because of the absence of findings sufficient in law to support it. This contention being thus directed to the attention of the Board, the Board concludes that there may be doubt as to the sufficiency of the findings made, but without conceding them to be deficient moves the Court to divest itself of jurisdiction and remand the case to the Board to enable the Board to set aside its order and make new findings and a new order, thus "obviating" or "eliminating" the issue raised in respect of the order sought to be set aside. Or, assume that the Board has made a finding alleged by the petition to be unsupported by evidence. The Board, reviewing the evidence in the light of the petition, reaches the conclusion that there may be danger that the Court would so hold. It also reaches the conclusion that the fact found, although erroneously considered by the Board in the making of its order, is not essential to its final conclusion. It therefore moves the Court to divest itself of jurisdiction in order that it may itself set the order aside, eliminate the finding in question and make a new order. It will scarcely be contended that the Act contemplates any such procedure, particularly in view of Sec. 10(d) which permits the Board to retrace its steps even after a petition to set aside is filed and until a certified transcript of record is filed. *In re Petition of National Labor Relations Board, supra.*

Or assume that the petition alleges that the Board in reaching its conclusion failed to give consideration to facts and circumstances required to be considered by it, or gave consideration to facts and circumstances which it was not entitled to consider. Reviewing its findings, decision and order in the light of these allegations, the Board reaches the conclusion that the issues thus raised, if submitted to the Court for determination, might be determined adversely to it. It accordingly moves the Court to divest itself of jurisdiction and remand the case to the Board in order that it may set aside its existing order, and after revising its decision so as to obviate the issues thus raised, make a new order. It will scarcely be contended that the Court is possessed of any such power.

In point of fact, in the petitioner's case, the petitioner alleged that the order was invalid because unaccompanied and unsupported by findings of fact within the meaning of the Act (Par. 10, R. 66), because the purported findings of fact were in material and controlling respects not supported by evidence and were inadequate, incomplete and insufficient because of the failure of the Board to consider facts required to be considered by it (Par. 12, R. 66). It further alleged that the order was invalid because of misconduct on the part of the Trial Examiner (Pars. 13-16, R. 66-67) and that various parts of the order were invalid by reason of the absence of findings necessary to support them, insufficiency of the evidence to support the findings made, and because in making them the Board exceeded the powers conferred upon it by the Act (Pars. 54-67, R. 74-76). It will scarcely be contended that, upon motion of the Board, the Court could divest itself of jurisdiction and remand the case to the Board for the purpose of per-

mitting the Board to set aside its order, and after further proceedings and reconsideration, enter a new order either in substance similar to the old one or modified so as to "obviate" or "eliminate" the issues raised by the petition to set aside.

The statute does not empower the Court to divest itself of jurisdiction by remanding the case for the purpose of permitting the Board to take further proceedings which, if taken, may "obviate" or "eliminate" the issues raised either by a petition to set aside the Board's order, or by the respondent's answer in a suit brought by the Board to enforce it. The reason why it does not is plain. In the orderly conduct of proceedings such as this, even more than in ordinary court proceedings (*Cf. Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547), it is essential that at some given point of time an administrative board, which is both prosecutor and judge, shall lose control of the proceedings and that a court shall obtain exclusive jurisdiction thereof. By Section 10(d) of the Act the greatest latitude is given to the Board to correct its errors until the time when a certified transcript of the proceedings before it is filed in court. If thereafter it could have the case back for the asking, there is no reason in principle why at any time prior to decree it could not avail itself of this right. It could indeed upon or after the hearing upon the merits before the court insist upon a remand upon the slightest intimation from the court of its belief that there had been some irregularity in the proceedings before the Board. Even were such a construction of the Act possible, as it is not, it ought not to be made unless unavoidable.

There is no distinction in principle between the cases assumed and the instant case. Once the jurisdiction of the

Court has attached, the Act requires it to proceed to a decree. If, as a result, the Court sets the order aside, it is not concerned with the proceedings that the Board, which is not a judicial body, may thereafter take. *Morgan* v. *United States, supra,* on petition for rehearing.

The action of the Court below in both cases was thus predicated upon an error common to both, to wit, that the Court could divest itself of jurisdiction, and without itself setting the order aside either as a result of admissions made by the Board upon some issues or after a determination of all the issues presented, remand the case to the Board for the purpose of allowing it to set aside its own order and to take further proceedings for the purpose of "obviating" or "eliminating" some of the issues raised by the petitioner. It is immaterial whether such issues relate to the sufficiency of the hearing, the sufficiency of the findings, the sufficiency of the evidence to support the findings, the sufficiency of the legal theory upon which the order is predicated, or upon any other error of law by reason of which the order of the Board may be set aside. Petitioner, having invoked the jurisdiction of the Court for the purpose of having these issues determined, was entitled to have them determined unless, by reason of admissions of the Board confessing its own error, the petitioner became entitled to a decree setting the order aside without such determination.

The Board, like the petitioner, must stand or fall by the record made in the proceedings before it, except only to the extent that either party for good cause shown may be permitted by the Court to adduce further evidence before the Board.

APPENDIX

Paragraphs (d), (e) and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. §§ 151-166) provide as follows:

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and

enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order

in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

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CLERK

Supreme Court of the United States

OCTOBER TERM,, 1938.

No. 182

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

BRIEF ON BEHALF OF PETITIONER IN REPLY TO BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FREDERICK H. WOOD
LOUIS J. COLOMBO
ALFRED MCCORMACK
Counsel for Petitioner.

Supreme Court of the United States

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1

CERTIORARI SHOULD BE GRANTED WITH RESPECT TO THE ORDER OF THE CIRCUIT COURT OF APPEALS PERMITTING THE BOARD TO WITHDRAW ITS PETITION WITHOUT PREJUDICE.

It is claimed by the Board in its brief that the action of the Circuit Court of Appeals in permitting the Board,

without authority in the statute, to withdraw without prejudice its petition to enforce the order made by it against Petitioner, was a proper order by reason of the alleged fact that the order did not prejudice Petitioner. It is apparently conceded, as it must be under the cases,[1] that where true affirmative relief has been demanded, the party opposing a withdrawal without prejudice is subjected to prejudice if the withdrawal be permitted. The claim, however, is that the prayer in our answer for affirmative relief, to wit, for the setting aside of the order, is not for true affirmative relief. In other words, it is asserted that a reviewing court's refusal to enforce an order of the Board is in all respects equivalent to setting aside that order. Obviously it is not. When the reviewing court dismisses a petition to enforce, without setting aside the order, it seems entirely plain that the Board's order remains in force and effect, and that if the Board cared to, it could reapply later for enforcement or even apply to another Circuit Court of Appeals for that purpose. On the other hand, when a court dismisses an ordinary civil case without prejudice, nothing remains pending, and the situation is the same as if the case had never been brought. Thus, what the Petitioner has asked in the setting aside of the order is true affirmative relief, and this, of itself, for the reasons stated in our main brief, and in view of the cases therein cited, defeats the Board's argument.

Moreover, as conclusively demonstrated in Point IV, pages 19 through 25 of our main brief, very substantial prejudice has accrued to Petitioner by reason of the Court's order in that it is forced into a second administrative pro-

[1] *E. g., Ex Parte Skinner* v. *Eddy Corp.*, 268 U. S. 93, and other cases cited at pages 14-15 of our main brief.

ceeding after the first has been definitely closed, and after a court has obtained exclusive jurisdiction of the Board's order.[2] None of the Board's cases hold that there can be a dismissal without prejudice, after the case is closed, and indeed they suggest to the contrary. Petitioner has thus been deprived of the opportunity of demonstrating to the Court that the Board's order should be set aside for the many and sundry reasons set forth in its answer (R. 9-21) including many important ones not mentioned by the Board in its petition to withdraw without prejudice. Assuming that some of these defects are correctible, it is rather plain that others are not. Hence petitioner has a right to have these passed on by the Court which had obtained exclusive jurisdiction, before being burdened with a second administrative proceeding. This case is not one in which the administrative tribunal has confessed to an error or errors which are clearly correctible and has asked the opportunity of correcting them. If it had done this, then the order would be set aside upon specified grounds and these matters would have been settled in so far as their effect upon further proceedings by the Board is concerned. Not having done so, it is respectfully submitted that it had no more right than a respondent seeking to set an order aside would have to withdraw without prejudice to avoid a consideration of the issues.

Up to this point, we have argued on the assumption that some prejudice to Petitioner is necessary in order to justify its position. It would seem clear that it is not.

[2]Surely the rule that one must exhaust his administrative remedy before resorting to the courts does not mean that after an administrative tribunal has closed a hearing and elected to go into court, it can compel the unlimited further hearings which the Board's contentions would make possible.

Unless the Circuit Court of Appeals, which is granted only a special and limited jurisdiction by the statute, has the power to permit a withdrawal without prejudice, it would seem clear that its order is unauthorized, whether or not Petitioner is actually prejudiced thereby. The case in this respect is analogous to a trial court becoming *functus officio* upon the expiration of the term. *Roemer* v. *Simon*, 91 U. S. 149; *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547.

Finally, the Court is dealing in this case with a statutory proceeding. The statute (Sec. 10 d, e and f) contemplates that when the jurisdiction of the Court is invoked either by the Board or by the employer, the Court at the conclusion of the case shall enter an affirmative order either enforcing the order of the Board or setting it aside. In its last analysis, the argument of the Board is that even after the jurisdiction of the Court has attached, the Court, at the instance of the Board, may direct the proceeding to be discontinued in order to permit the Board to patch up its record and by so doing either avoid issues raised in court or cure existing infirmities in the order, by reason of which the Court would be required to set it aside. The Board would never admit that any such correlative right could be recognized in the employer. But it says that it is entitled to have the case discontinued at its instance for this purpose because the employer will then obtain, by the voluntary act of the Board, the same relief which it would obtain from the Court in the event that the order should be set aside. It is therefore claimed that the employer has not been prejudiced. We think it is clear it has been prejudiced by the very course suggested because, for one thing, it has been deprived of an affirmative decree to which

it is entitled setting aside the order, but whether it has been prejudiced in other ways would depend upon the grounds upon which an order of Court setting the order of the Board aside was based. These might be such that the making of any further order on the same record would be impossible.

II

CERTIORARI SHOULD BE GRANTED WITH RESPECT TO THE ORDER OF REMAND MADE BY THE CIRCUIT COURT OF APPEALS.

The cases cited by the Government (pp. 15-18) not only do not support its position but are authorities in favor of ours. In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 169 U. S. 197, this Court definitely said at page 238 that the decree should be reversed before a "remand" to the Interstate Commerce Commission. As appears from the headnote in *Southern Railway* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, and from page 302 in that opinion, the judgments of the lower court were reversed before the "remand". In all three of the Federal Trade Commission cases, cited by the Government at pages 15-16 of its brief, the order of the Federal Trade Commission was set aside, and they are strictly in accord with our argument.

In a strict sense, of course, there is no remand when the courts are dealing with an order of an administrative tribunal as distinguished from an order, judgment or decree of a court. In the former case the reviewing court merely indicates its views as to what ought to be done for the guidance of the administrative tribunal, which being the law, may authorize the Board in some cases to reopen the proceedings or to utilize the old record in new proceedings.

The cases above discussed are all of the cases cited by the Board bearing upon the power of an appellate court to remand to an administrative tribunal without setting aside the order of the tribunal. They incontestably demonstrate the validity of our argument.

In an attempt to explain its failure to find any cases to support its argument, the Board resorts to what it claims is an analogous situation, that is the relationship between an appellate court and a lower court. The situation is plainly not analogous because the appellate court and the lower court are both impartial and parts of the judicial system, while an administrative tribunal is not judicial, combines the functions of prosecutor and judge, and is independent of the courts which are only authorized to review the regularity of its proceedings and not to direct them.

In our main brief, however, we have demonstrated that the same rule applies in the case of a remand by an appellate court to a lower court, that is that the judgment or decree must be reversed, as it has not been here. This clearly appears from *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, which the Government futilely attempts to distinguish. It is argued that the Board "understands that it is to vacate its order", but even if this had the same legal effect as a vacation by the court, as it has not, this would mean nothing because the appellate court has no control over an administrative tribunal which, once it gets the case back, can do anything it pleases with it, and indeed in this case upon making a new order can go into some other Circuit Court of Appeals and thus prevent the court which remanded from having any control in the enforcement of directions.

The fact is that administrative tribunals are utterly different from courts. They combine the functions of prosecutor and judge. When as in such cases as *Roemer v. Simon*, 91 U. S. 149, and *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, a lower court has asked the return of a record, it is in a very different position from an administrative tribunal. The court is impartial, the administrative tribunal must make its request through its prosecuting arm which is carrying on the litigation in court. The difference is vast, and the request of the administrative tribunal is to be analogized to the request of a party and not of a court.

It is unnecessary to discuss the various other cases cited by the Government on page 17 of its brief. In none are the facts even remotely similar to our situation, and they all concern the relationship between an appellate court and the lower courts or between a trial court and its officers, and not between a Circuit Court of Appeals and an administrative tribunal.

It is respectfully submitted that the writs in both cases should be granted.

Respectfully submitted,

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ALFRED MCCORMACK
Counsel for Petitioner.

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BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1938

FORD MOTOR COMPANY, *Petitioner*, *against* NATIONAL LABOR RELATIONS BOARD.	No. 182
FORD MOTOR COMPANY, *Petitioner*, *against* NATIONAL LABOR RELATIONS BOARD.	No. 183

BRIEF FOR THE PETITIONER

Opinions below

The orders being reviewed were entered without opinion (R. 51, 108) and are unreported.

Jurisdiction

The order being reviewed in No. 182 was entered on May 5, 1938 (R. 51), and the order being reviewed in No. 183 was entered on June 10, 1938 (R. 108). The petition for writs of certiorari was filed on July 7, 1938, and the orders granting the writs were entered on October 10, 1938. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the

Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347(a)). *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92; *Gay* v. *Ruff*, 292 U. S. 25; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Forsythe* v. *Hammond*, 166 U. S. 506.

Statute Involved

The questions presented involve an interpretation of subsections (d), (e) and (f) of Section 10 of the National Labor Relations Act, 49 Stat. 449; 29 U. S. C. §§ 151-166 (hereinafter referred to as the Act), and can best be stated after a statement of the facts of the two cases.

These subsections of the Act, which are quoted in the pertinent parts of this brief, are also set forth in full in the Appendix hereto.

Statement of the Cases

The Board's Case (No. 182 in this Court; No. 7919 Below).

On December 22, 1937, in a case pending before it, the National Labor Relations Board (which we shall refer to as the Board) issued an order against petitioner requiring it to cease and desist from certain alleged unfair labor practices and to take certain affirmative action (R. 2).

On January 7, 1938, the Board filed in the court below a petition for the enforcement of such order (R. 1), and at the same time filed with the court a certified transcript of the record of the proceedings before the Board (R. 6).*

*The certified transcript was supplemented on January 10 (R. 8).

Upon the filing of the transcript, the jurisdiction of the proceeding passed from the Board to the court, by reason of Sec. 10(d), which provides:

> "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

And such jurisdiction became exclusive, under Sec. 10(e), which provides:

> "Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein * * *. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final * * *."

Petition for leave to adduce additional evidence

On April 4, 1938, petitioner filed with the court below its petition for leave to adduce additional evidence (R. 40) pursuant to the provisions of Sec. 10(e), which provides:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts,

or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order."

Petitioner's answer

Although not required to do so by any provision of the Act, petitioner on April 11, 1938, filed an answer to the Board's petition for enforcement, contesting the validity of the Board's order and praying that the order be "set aside" (R. 9). The answer alleged that the order was invalid on the following grounds, among others:

(a) that, by reason of fundamental defects and irregularities in its procedure the Board had failed to accord petitioner a full, fair and open hearing either in the taking of the evidence or in the subsequent parts of the proceeding (R. 9-17);

(b) that the trial examiner before whom the evidence was taken conducted himself as an advocate for the Board and the complaining union and questioned witnesses and otherwise conducted himself at the hearing in such manner as to cause witnesses to believe that it was their duty to give testimony unfavorable to petitioner and that they could with impunity give partial, misleading and false testimony provided that it was unfavorable to petitioner (R. 11-12);

(c) that the trial examiner, while improperly excluding evidence offered by petitioner, accepted

evidence in favor of the Board which had no probative value and was worthy of no credence (R. 12);

(d) that the Board did not itself consider the evidence, but without giving any judicial consideration to the case adopted as its own a decision prepared by its subordinates without according petitioner any opportunity to be heard thereon (R. 12-17), and

(e) that the Board in making its decision relied upon reports, memoranda and other communications extrinsic to the record, received from its employees (including employees who participated in the prosecution of the case), without according to petitioner any opportunity to test, refute or explain such reports, memoranda, and other communications, and was improperly influenced by extraneous considerations (R. 15).

As some of these allegations could be sustained only by evidence not appearing in the record, and as the Board had failed to deny any of them, petitioner filed with the court a motion to compel the Board to reply thereto (or, in the alternative, for a decree *pro confesso*); served upon the Board written interrogatories, and moved for a commission to take the depositions of certain witnesses (see R. 36-37, 40, 47).

The answer also challenged the order on various other grounds based on the record. It was alleged that the findings, in material and controlling respects, were not supported by the evidence; that the Board had failed to consider facts required to be considered, including facts ap-

pearing from the record and facts of common knowledge (see R. 21-25); that the findings failed to support the order, and that in other important respects the order exceeded, or represented an improper exercise of, the powers conferred upon the Board by the Act (R. 16-21). The answer alleged that the order, in so far as directed merely at criticism and disparagement of a labor organization by petitioner, abridged the freedom of speech and of the press in violation of the First Amendment to the Constitution (R. 19).

By its answer, the petitioner thus invoked the jurisdiction conferred upon the court under Sec. 10(e) of the Act—in a case where the Board has filed a petition for enforcement—to modify or set aside the order of the Board. Said paragraph provides that, upon filing of the transcript of record by the Board and notice to the adverse party, the court

> "shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

The Board's motion to withdraw

On May 2, 1938, the Board filed a motion for leave to withdraw, without prejudice, its petition for enforcement and the certified transcript of record (R. 35). Its motion adverted to certain of the issues raised by petitioner's answer, to petitioner's attempts to bring such issues to a hearing, and to the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1.* and stated that the

*Decided April 25, 1938; petition for rehearing denied May 31, 1938.

Board's purpose was "to eliminate certain issues as to the validity of the Board's procedure" and "thereafter make its decision and order", having "obviated on the transcript of record" certain "questions" raised by petitioner's answer (R. 37-38). But the Board admitted none of the allegations of petitioner's answer, denied that the decision in *Morgan v. United States* was applicable, and asserted that petitioner had not asked for "affirmative" relief, and could not do so under the Act, and that the Board had "an absolute right to such withdrawal without prejudice to the filing of a new petition" (R. 38). It was stated (R. 37, par. 4) that

> "Should the motion be granted, the Board will then set aside its order, pursuant to Section 10(d) of the Act, issue proposed findings to which the parties will be permitted to file exceptions and if they so desire argue objections before the Board, and thereafter make its decision and order, or take such further or other action as may be deemed advisable."

On May 5, 1938, the court entered an order which recited the filing of the Board's motion for leave to withdraw its petition and the certified transcript and ordered that it "be and hereby is granted" (R. 51). The court did not purport to make any determination as to the validity of the Board's order, or as to the necessity or propriety of further proceedings before the Board, and did not set aside the Board's order.

The Board made no attempt to exercise the "leave to withdraw" the transcript of record, and on May 9, 1938, the court vacated so much of its May 5 order as permitted such transcript to be withdrawn (R. 54).

The Board did not purport to exercise the leave granted to it to withdraw its petition until June 2, 1938, when it filed

a paper stating that the Board "withdraws the petition for enforcement" (R. 55), but did not physically withdraw it from the files of the court. On June 10, 1938, the court denied a motion of the petitioner to vacate the order of May 5 which permitted such withdrawal, but granted a stay of such May 5 order (R. 58). Hence both the Board's petition and the transcript of record are still on file with the court below, and no further proceedings have been had before the Board.

Question Presented in No. 182

Upon the facts recited, the following question is presented for decision in No. 182:

> Where the Board applies to a circuit court of appeals for the enforcement of an order, and the exclusive jurisdiction of the court attaches under the Act, may the court—without passing upon the issues raised by the respondent's answer, without setting aside or modifying the order of the Board, and without exercising in any other way the powers conferred upon it by the Act—divest itself of jurisdiction by permitting the Board to withdraw its petition without prejudice?

Petitioner's case (No. 183 in this Court; No. 8019 below).

In its motion to withdraw, filed in No. 182 on May 2, 1938, the Board asserted that the petitioner had no right to ask for affirmative relief in that proceeding, under subsec. (e) of Sec. 10 of the statute (R. 38).

In order to remove any possible doubt of the court's jurisdiction to grant the relief asked for, petitioner on May 4 filed with the court below a petition under Sec. 10(f) of the Act, praying for a review of the Board's order and for a decree setting it aside (R. 62). That paragraph of the Act provides:

> "(f) Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in * * * by filing in such court a written petition that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board."

A copy of the petition was duly served upon the Board.* There was no occasion, however, for petitioner to ask the Board to certify a transcript of the record for filing with the court below, since a duly certified transcript had already been filed in that court. Petitioner, therefore, filed with the court on May 4 a motion for an order consolidating the Board's case and petitioner's case and directing that the record filed in the Board's case be deemed filed in the consolidated case (R. 39). Petitioner also filed, on

*There has been filed in this Court as a supplement to the printed record a copy of the Board's acknowledgment of service of petitioner's petition on May 4, 1938, duly certified by the clerk of the court below to have been filed on May 5, 1938.

May 5, 1938, a motion in petitioner's case for an order directing that the record filed in the Board's case be deemed filed in petitioner's case or, in the alternative, directing the Board forthwith to provide petitioner with a certified transcript of record (R. 78).

The court did not pass on the motion to consolidate, but on May 9 made an order in No. 183 that the transcript of record already on file with it in No. 182 be deemed filed in petitioner's case (No. 183) as of the date of the filing therein of petitioner's petition for a review (R. 80). This order was entered at the same time as the order in the Board's case vacating so much of the order of May 5 as authorized the Board to withdraw the certified transcript of record (R. 54).

By such order the Court ruled that the filing of petitioner's petition on May 4, the record being on file, brought into operation the provisions of Sec. 10 (f) that

> "* * * the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction * * * in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *"

Petitioner's petition challenged the validity of the Board's order on substantially the same grounds as did its answer in the Board's case.* Petitioner renewed in its own case its attempts to frame the issues and to adduce evidence in proof of its allegations (see R. 108). It also

*The petition contained a specific allegation that the Board, in making its decision, consulted with persons other than members of the Board or its employees with respect thereto (R. 70).

moved to amend its petition by adding thereto more definite allegations that the exercise of the Board's prosecuting and judicial functions had been so intermingled throughout the entire proceeding as to vitiate any order that the Board might make in the proceeding, and a further allegation that by reason of a fixed bias and prejudice of the Board against petitioner and in favor of the complaining union, the Board had failed to act as an impartial trier of the facts (R. 81, 106).*

The Board permitted more than twenty days to elapse without making any answer to the petitioner's petition. On June 2, 1938, it filed two motions, one praying for an order vacating the order of May 9 which directed that the transcript filed in the Board's case be deemed filed in petitioner's case (R. 85), and the other praying for an order "remanding the case to the Board" (R. 103). In the former motion the Board contended that, in view of the decision of this Court in *In re National Labor Relations Board,* decided May 31, 1938** (58 Sup. Ct. 1001), the Board has an *absolute right* to withdraw a proceeding under Sec. 10 of the Act whenever it announces an intention to take further action therein, since thereupon the order of the Board before the Court for review ceases to represent the Board's "final action" (R. 88).

The motion for a "remand" stated that it was filed "In the event that the Court denies the Board's motion, herewith filed, to vacate the Court's order of May 9" (R. 103). As stated by the Board in its brief in opposition to the

*When the court entered its orders of June 10 bearing upon the issues of withdrawal and remand, it also entered orders denying other pending motions in No. 183, including petitioner's two motions to amend its petition (R. 108).

**The opinion is set forth at R. 90 *et seq.*

petition for writs of certiorari, both motions were designed to accomplish "the same practical result" (p. 14), *i.e.*, to make it possible for the Board to take further action in the proceeding for the purpose of "obviating upon the record" certain of the issues raised by petitioner (R. 104).

On June 10, 1938, the court entered an order (R. 108) which disposed of all pending motions, including the Board's two motions of June 2. It denied the Board's motion to vacate the order of May 9 directing that the certified transcript be deemed filed in petitioner's case. It granted the Board's motion to "remand" petitioner's case to the Board as follows (R. 108):

> "The motion of respondent filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted."

but it stayed the order of remand pending determination of the issue by this Court upon petition for writ of certiorari (R. 108-9).

In granting the motion to remand, as in granting the order in the Board's case permitting it to withdraw its petition for enforcement, the court did not make or purport to make any determination as to the validity of the Board's order or as to the necessity or propriety of further proceedings before the Board and did not set aside the Board's order.

Question presented in No. 183.

Upon the facts recited, the following question is presented for decision in No. 183:

Where a person aggrieved by an order of the Board files a petition for review under Sec. 10(f) of the Act, and the transcript of the record has been filed in the court in accordance with the Act, may the court, upon application of the Board—without passing upon the issues raised by the petition, without setting aside or modifying the order of the Board, and without exercising in any other way the powers conferred upon it by the Act—divest itself of jurisdiction by "remanding" the case to the Board for further proceedings which the Board may desire to take?

The petition for writs of certiorari prayed for (1) a review of the order of May 5, 1938, in the Board's case granting the Board leave to withdraw its petition for enforcement and (2) a review of the order of June 10, 1938, in petitioner's case granting the Board's motion to remand petitioner's case to the Board.

Specification of Errors

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In permitting the Board to withdraw without prejudice its petition for enforcement of its order.

2. In refusing to vacate its order permitting the Board to withdraw without prejudice its petition for enforcement of its order.

3. In failing and refusing to proceed in petitioner's case to a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

4. In remanding petitioner's case to the Board.

5. In remanding petitioner's case to the Board without any determination that the order of the Board was invalid, without any determination as to the necessity or propriety of further proceedings before the Board, and without setting aside the Board's order.

6. In remanding petitioner's case to the Board without advice, direction or determination as to the law applicable to any further proceedings before the Board.

7. In failing and refusing to proceed in the Board's case to a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

Summary of Argument

POINT I—The order in the Board's case permitting the Board to withdraw without prejudice its petition for enforcement was erroneous and should be reversed.

(1) The provisions of Section 10 of the Act expressly negative any right of the Board to a dismissal or "withdrawal" of the petition and any discretion in the Court to permit such dismissal or "withdrawal."

(2) Assuming that Sec. 10 could be construed so as to justify the action of the court below, such construction ought not to be adopted because it would defeat the purposes of the Act.

(3) The authorities governing voluntary nonsuits in ordinary civil litigation, if applicable, require a reversal of the order below.

POINT II—The order in petitioner's case (No. 183) remanding the case to the Board was erroneous and should be reversed.

A. The jurisdiction of the court below having attached, the Act required it to proceed to a determination of the case and precluded it from "remanding" the case to the Board without such determination.

(1) The order below was not a "remand" but was an abdication of the court's statutory jurisdiction.

(2) The court below had no power to "remand" the case without deciding it and setting aside the Board's order.

B. The authorities cited by the Board do not support the order of remand. On the contrary, these and other authorities show that the court was clearly in error in sending the case back to the Board without determining the issues raised by the answer.

The Board's alleged analogous cases, if in point, do not support its contention.

C. The action proposed by the Board purports to meet only one group of objections to the order which have been raised by the petition.

D. The Board's suggestion that the court below did not have jurisdiction of the petitioner's case raises issues which are not before the Court and in any event is without merit.

(1) The jurisdiction of the court in petitioner's case was complete upon the filing of the petition, independently of the order of May 9.

(2) The issuance by the Board of the notice of May 6 had no effect on the jurisdiction of the court.

POINT III—The orders below should be reversed and the cases remanded to the Circuit Court of Appeals for further proceedings in accordance with Section 10 of the National Labor Relations Act.

ARGUMENT

POINT I

The order in the Board's case permitting the Board to withdraw without prejudice its petition for enforcement was erroneous and should be reversed.

(1) The provisions of Section 10 of the Act expressly negative any right of the Board to a dismissal or "withdrawal" of the petition and any discretion in the Court to permit such dismissal or "withdrawal".

A consideration of the Act shows that its application is plain, and that the court below had no power to dismiss the petition.

Section 10 draws a clear line between the jurisdiction of the Board and the jurisdiction of the courts; it provides exactly when a shift of jurisdiction from the one to the other occurs; it excludes any right in the Board to oust the court's jurisdiction once it has attached, and equally excludes any power in the court to abdicate its statutory duties in favor of the Board.

Jurisdiction of the Board

The power of the Board to prevent unfair labor practices is, by subsec. (a), made exclusive; under subsec. (d) its jurisdiction continues *"Until* the transcript of the record in a case shall have been filed in a court", and up to that time it has the widest power to mold its processes in order to attain an effective and enforceable order. The filing of a complaint does not necessarily fix the issues to be decided;

for under subsec. (c) the power of amendment of a complaint continues during the hearing and thereafter until "the issuance of an order based thereon". Subsec. (c) makes filing of the written testimony with the Board the equivalent of submission of the case for decision; but even such submission does not exclude further action, since it is expressly provided that the Board "may take further testimony", subject to no limitation except that it must do so "upon notice".

Even when the Board issues its order in a proceeding, it still retains the utmost freedom of action, by reason of subsec. (d), which provides that, until filing of the transcript in a court,

> "the Board may at any time * * * modify or set aside, in whole or in part, any finding or order made or issued by it."

The presence in the statute of these specific provisions freely allowing the amendment of complaints and the supplementing of the record by such additional testimony as the Board may from time to time think necessary, and giving the Board unrestricted power over its orders after they have been issued, would negative the continuance of such power after the filing of a transcript in the court, even without the specific provisions of subsecs. (e) and (f) dealing with the court's jurisdiction.

Jurisdiction of the Court

Subsecs. (e) and (f) complement the provisions of the previous subsections, and emphasize the dichotomy.

Subsec. (e) provides that the Board, when it seeks enforcement of its order, shall file a transcript of record in the court and that

> "Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, *and to make and enter* upon the pleadings, testimony, and proceedings set forth in such transcript *a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part* the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."*

Subsec. (f) provides that any person aggrieved by a final order of the Board "may obtain a review of such order" in an appropriate court

> "by filing in such court a written petition praying that the order of the Board be modified or set aside".

It then provides for service of a copy of the petition and filing of the certified transcript, and that

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by the

*All italics in these quotations are ours.

> Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner *to make and enter a decree* enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *"

It will be noted that subsec. (e) provides that, after filing of the

> "transcript of the entire record in *the* proceeding"

and notice to the adverse party, the court shall have jurisdiction, and such jurisdiction shall be exclusive.

It will also be noted that the statute does not say that the court shall have exclusive jurisdiction only of the enforcement of the Board's order; it provides for exclusive jurisdiction

> "of *the* proceeding and of the *question determined* therein."

The "proceeding" is that which has been before the Board, and of which a transcript of the "entire record * * * including the pleadings and testimony upon which such order was entered and the findings and order of the Board" has been filed; and the *question determined therein* is the issue or issues which the Board has determined and which the court is to review. Hence it seems obvious that the court's jurisdiction is intended to be exclusive, not only of that of all other courts, but of that of the Board as well.

Moreover both subsecs. (e) and (f) invest the court with mandatory jurisdiction to make an affirmative decree

in favor of a successful respondent.* If the Board sues under Sec. 10 (e) and the court finds the order not enforcible, it must not only deny enforcement but must enter a decree setting the Board's order aside. *Per contra*, if a party aggrieved by an order sues under Sec. 10 (f) and the court refuses to set the order aside, it must make a decree enforcing the order of the Board either in its original form or as the court may modify it; and if the party aggrieved sues under Sec. 10 (f) for a modification of the order in any respect, the court is required to decree its enforcement in all other respects.

Under these provisions of the Act, the filing of the Board's petition for enforcement gave the court (the transcript of record having been filed) the same exclusive jurisdiction to set aside the Board's order as it would have had upon the filing of a petition by the petitioner for a review of the order, and this without regard to whether or not petitioner filed an answer or made any prayer for relief. However, petitioner did file an answer and did pray for relief and expressly asked that the order of the Board be "set aside" (R. 21).

Taking of additional evidence

That the intent of the Act is to make the Court's jurisdiction exclusive, not only of that of other courts but of that of the Board as well, is evidenced also by the provisions of

*The statute uses the words "the court * * * shall have power"; but this Court has held in a number of cases that language permissive in form must be regarded as imposing a mandatory duty when used to define the powers of a public authority. *Michaelson* v. *U. S.*, 266 U. S. 42, 70; *Supervisors* v. *United States*, 4 Wall. 435, 446; *Mason* v. *Fearson*, 9 How. 248; *Galena* v. *Amy*, 5 Wall. 705; *Ritchie* v. *Franklin County*, 22 Wall. 67.

subsec. (e) for the taking of additional testimony. Either the Board or the respondent may obtain leave of the court to adduce additional evidence upon a proper showing to the court of materiality and excuse for failure to adduce before the Board. In that event, the power of the court is "to order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript".

Such an order, however, does not divest the court of its exclusive jurisdiction or revest in the Board any power to modify its own order, but permits it only to modify its findings, and to file with the court "its recommendations, if any, for the modification or setting aside of its original order", whereupon the court must proceed with its statutory duty to enforce, modify or set aside the Board's order. Thus the fact-finding function of the Board is preserved and, if its modified findings of fact lead it to a conclusion different from that of the order which it originally made, it may advise the court to that effect. But the jurisdiction of the court to enforce, modify or set aside the Board's order remains plenary and exclusive.

The court's duties under this statute are clearly set forth. It has no option either to hear the case or to return it to the Board for whatever action the Board may care to take. It is mandatory upon the court to assume jurisdiction and to decide the case, with or without the taking of additional testimony.

Such is not only the clear meaning of the words used in the statute, but is a necessary conclusion to be drawn from the reasoning of the Court in *In re National Labor Relations Board, supra,* wherein the Court referred to the

filing of a transcript of record as a "plenary submission of the cause" to the court, and said:

> "The Act plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act *once the transcript of the Board's proceeding is before it.*" (Italics ours.)

(2) Assuming that Sec. 10 could be construed so as to justify the action of the court below, such construction ought not to be adopted because it would defeat the purposes of the Act.

Subsecs. (e) and (f) are similar in their provisions with respect to the jurisdiction of the court and its powers, since subsec. (f) provides that, upon the filing of a petition for review and of a certified transcript of record, "the court shall proceed in the same manner as in the case of an application by the Board under subsec. (e) and shall have the same exclusive jurisdiction * * *". The two statutory provisions, therefore, must be considered and interpreted together.

The construction of the statute urged by the Board would result in endless confusion and delay. Neither party, having invoked the court's exclusive jurisdiction, would be bound to abide by it; and each could withdraw its court proceeding at any stage before decree whenever it might suit its purposes. In a case such as this, where the respondent does a nation-wide business, proceedings might be started and withdrawn in one after another of the ten circuit courts of appeals. Such a construction flies in the face of the express provisions of subsecs. (e) and (f) that the

court's jurisdiction shall be "exclusive" and that the court, whichever party invokes its jurisdiction, shall proceed to an affirmative decree in favor of the successful party. It also flies in the face of the provision of subsec. (i) that:

> "Petitions under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

In this case, the Board has neither admitted nor denied the validity of the objections raised by the petitioner which it wishes to "obviate on the transcript of record". If it admitted their validity, the court's duty would be to set aside the Board's order and if, as we should contend, the deficiencies of procedure were so fundamental that they were beyond correction, that would be the end of this particular proceeding.

On the other hand, if the Board had believed petitioner's objections to be without merit, its duty was to proceed with its suit and, if successful, to a decree of enforcement. The statute does not contemplate that the Board shall blow hot and cold; that it shall bow to the objections but prevent them from having their legal effect of invalidating the Board's order.

Nor does the statute contemplate that, after the court's jurisdiction has attached, the Board shall have power to select the issues which it wishes to have the court decide, withdrawing for reconsideration by itself any issues which it may find embarrassing, and to prevent the court from proceeding to consider the other defenses which have been raised. Yet that is what it has attempted to do here. Its proposed action is not responsive to the defenses set up by

the petitioner's answer, but only to some of them.* By taking these issues back to itself for reconsideration and possible cure, it prevents petitioner from having a hearing on other issues which it displays no intention to reconsider and which, if petitioner can establish them, involve administrative deficiencies so fundamental that no amount of reconsideration could cure them.

The court below did not set aside the order of the Board, and it remains outstanding against the petitioner. There is no duty imposed upon the Board hereafter to set aside its order. It is entirely free to change the intention which it expressed when it made its motion and to commence a new proceeding in the court below or in another circuit court of appeals. If, as the Board contends, the dismissal of the petition puts it back in the position where it stood prior to the filing of the transcript (in spite of the use of the word "Until" in subsec. (d)) then, under that subsection and the rules of the Board, it has a wide field of choice as to further procedure.

It may, for example, let the case lapse for a year or two for some supposed reason of policy. It may amend its complaint to charge unfair labor practices not charged in the original complaint, thereby increasing the prejudice to petitioner from the pendency of undetermined charges against it. It may consolidate the case with other cases against petitioner, either now pending or hereafter instituted.

It may, in fact, take additional evidence to support its position on one or more of the issues in the case, and at the same time refuse to take the additional evidence which

*This subject is more fully developed under Point II, *infra* pp. 69-74.

the petitioner desires to adduce in order to support its defenses on other issues*; and this in spite of the clear purpose of the statute to make the taking of additional evidence a matter for the court to decide, whether the party which seeks leave to adduce additional testimony be the Board or the respondent.

By reason of these and other possibilities, the orders of the court below subject the petitioner, not only to further proceedings before the Board for the ostensible purpose of eliminating certain of the issues raised by its answer, but to proceedings of scope and duration limited only by the Board's concept of its full power under the Act.

When the Board's motion to withdraw was granted, there was pending a motion by petitioner for leave to adduce additional evidence; and by reason of the action which it took, the court below did not pass upon this motion. Thus petitioner was denied the right, clearly given to it by the statute, to have the court pass upon the question whether such additional evidence is "material" and whether there were "reasonable grounds for the failure to adduce such evidence in the hearing before the Board", and to have such evidence taken if the court should find in its favor on those issues. This fact alone makes the order below invalid, apart from the other considerations to which we have referred.

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*We are not suggesting in any of these illustrations that the Board would deliberately act in violation of the law, but are merely pointing out the numerous courses of action which might be open to it, any one of which it might choose for some supposed reason of policy, wise or unwise; and to show how far the Board would be in a position to depart from the relatively simple and prompt course of procedure which the Act on its face provides for, once the Court has acquired jurisdiction.

The statute contemplates a proceeding before the Board which is brought to a conclusion, and which then passes into the exclusive jurisdiction of the court for final determination. Under the Board's theory, if the answer sets up defenses which appear to be well taken, or which the Board may consider dangerous, or which, for some reason of policy—administrative, economic, social or political—the Board may not care to have litigated, then it may simply withdraw its petition, set aside the order, attempt to correct the error or eliminate the unwanted issue, and make another order. If, on another petition for enforcement, the respondent again sets up good or dangerous defenses, the process may be repeated, and so on until the respondent is either worn out or insolvent, or the Board decides to submit to a court's jurisdiction. During all this period, the respondent suffers the prejudice that necessarily flows from the pendency of charges of unfair labor practices.

The purpose of the Board's motion was, as appears from the face of the motion papers, to avoid going to issue on meritorious defenses and to prevent or postpone a decision against it. This purpose was clearly improper; the Board has no standing to insist that it shall sit in judgment on itself, in place of the court, on whom the duty has been imposed by Congress.

(3) The authorities governing voluntary nonsuits in ordinary civil litigation, if applicable, require a reversal of the order below.

The Board has based its case in No. 182 entirely upon the assumption that in this purely statutory proceeding the same rules for dismissal without prejudice must apply as

in ordinary civil litigation—in spite of the express provisions of the Act which require the court, whichever party invokes its jurisdiction, to proceed to a decree in favor of the successful party, whether petitioner or respondent.

Even apart from the express provisions of the Act, there is a vast difference between a withdrawal without prejudice of the Board's petition and the voluntary dismissal of a suit by a private plaintiff.

When a private litigant dismisses a bill of complaint, the case is at an end. Another proceeding may or may not be instituted. Here, however, withdrawal by the Board of its petition does not end "the proceeding". It merely transfers it from the jurisdiction of the court to the jurisdiction of the Board, thus (while leaving the Board in its position of prosecutor) replacing the court by the Board for the purpose of exercising the judicial function. Upon such transfer, petitioner must continue to participate in the proceeding—to whatever extent necessary for the protection of its rights and no matter what may be the nature of the further proceedings which the Board, exercising the plenary power which it asserts, may determine to take.

The question therefore is not, as in the case of a private litigant, *whether* the proceeding shall continue over plaintiff's objection, but simply *where* the proceeding shall continue. As thus formulated, the answer to the question is very simple, since, as we have pointed out, the Act clearly contemplates that the proceeding shall be conducted before the Board *until* a transcript is filed with the court and shall *thereafter* be conducted in a circuit court of appeals of appropriate territorial jurisdiction.

However, the authorities governing voluntary nonsuits in ordinary civil litigation are, if applicable, conclusive in demonstrating that the court's order permitting the Board to withdraw was erroneous.

Equally well established as the doctrine that a plaintiff may dismiss his suit if the defendant will not be prejudiced thereby is the doctrine that prejudice to defendant such as will bar plaintiff from a voluntary nonsuit is present if the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief. The principle was clearly stated by this Court in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93-94:

> "The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree."

There can be no doubt that petitioner was in a position to demand on the pleadings an opportunity to seek affirmative relief, in the form of an order of the court setting aside the Board's order. Nor can there be any doubt that petitioner had been put to the trouble of getting its counter case properly pleaded and ready, as may be seen from the following review of only some of the affirmative steps taken by the petitioner after the making of the Board's order on December 23, 1937.

On January 3, 1938, petitioner moved the Board that the order be set aside and a rehearing granted, and in its petition set forth in considerable detail the grounds of the asserted invalidity of the order (R. 21-31). This motion was denied on January 4, 1938 (R. 8). Thereupon petitioner filed a return to the Board's order, framing the issues between itself and the Board (R. 31-34).

About three months after the filing of the Board's petition with the court below, and after the record below had been agreed upon and printed, petitioner on April 11 filed an answer consisting of 64 paragraphs and containing a detailed statement of its defenses and of the basis of its prayer for affirmative relief (R. 9-21). On April 4 it had moved the court for leave to adduce additional evidence, in accordance with the statute (R. 40). On April 11 it moved for an order compelling a reply to certain affirmative allegations in the answer (R. 36). On April 27 it moved for a commission to take depositions of the members and staff of the Board on certain issues raised by the answer (R. 40). On May 2 it addressed to the Board written interrogatories on these matters (R. 40).

Under these circumstances, it is difficult to see what more the petitioner could have done in order to bring itself within the language of *Ex parte Skinner*, as a defendant who had "been put to the trouble of getting his counter case properly pleaded and ready". The petitioner had taken every step that it could take in order to have its rights adjudicated, and clearly it is entitled to the benefit of the rule laid down in that case.

The authorities do not support the Board's position that relief is not "affirmative" where the granting of such relief to the defendant would have no greater legal effect than

a dismissal of plaintiff's bill on the merits. On the contrary, the typical case for application of the rule is one where what the defendant is seeking is an adjudication of the plaintiff's claim, and where the affirmative relief which the defendant asks will have the same legal effect as a dismissal of the plaintiff's case on the merits.

For example, in *City of Detroit* v. *Detroit City Railway Company*, 55 Fed. 569, an opinion by Chief Justice Taft which was cited and quoted in *Ex parte Skinner & Eddy Corp., supra* (265 U. S. at 93), the City of Detroit sought to oust the railway company from the streets of the City under an ordinance purporting to repeal its franchise, and the railway company by its answer prayed that the ordinance be declared void and that the City be enjoined from attempting to enforce it. It was held that the City could not take a voluntary dismissal, although an adjudication in favor of the defendant upon its answer, even accompanied by an injunction, would have no greater effect than a dismissal of the plaintiff's bill because of the invalidity of the repealing ordinance.

Similarly, where a plaintiff seeks to enforce a lien and defendant by answer or cross-bill asks that the lien be adjudged invalid, the plaintiff may not dismiss without prejudice.

Stevens v. *The Railroads*, 4 Fed. 97*;
Callahan v. *Hicks*, 90 Fed. 539;
Sauter v. *First National Bank*, 8 F. (2d) 121.

And where a plaintiff puts in issue the conflicting patents or patent licenses of itself and the defendant, and the defendant seeks an adjudication that plaintiff's patent

*Aff'd *sub nom. Tennessee Bond Cases*, 114 U. S. 663.

or license is invalid, plaintiff is not allowed to dismiss without prejudice.

Electrical Accumulator Co. v. *Brush Electric Co.*, 44 Fed. 602;
Hat-Sweat Mfg. Co. v. *Waring*, 46 Fed. 87;
Automotive Products Corp. v. *Wolverine B. & S. Co.*, 15 F. (2d) 745;
Cf. In re Georgia Power Company, 89 F. (2d) 218, cert. den. 302 U. S. 692.

In each of the above cases, and in those which are cited below, the defendant's purpose was an adjudication of the invalidity of the plaintiff's claim, and the defendant's interests would have been served as well by a judgment dismissing the plaintiff's bill on the merits as by granting the defendant a decree, either affirmative in form or in the nature of a declaration of its rights. These cases support the proposition that where the relief that the defendant asks for is an adjudication of the plaintiff's claim in its favor, and the interest of the defendant in the matter is of such a nature that it would itself be entitled to maintain a suit for the purpose of obtaining such adjudication, it may successfully oppose an application by the plaintiff for a voluntary dismissal without prejudice and insist that the controversy be decided.

In view of these authorities, the proposition asserted by the Board* that, "The setting aside of an order, having no greater effect than a denial of the prayer of a petition to enforce, is not 'affirmative relief' barring the plaintiff's right to a nonsuit", is clearly erroneous.

*Br. in Op. to Pet. for Cert., p. 11.

Under these authorities, it is of no importance in the present case that a decree setting aside the Board's order might have no greater legal consequence than a decree dismissing its petition for enforcement on the merits. By expressly permitting any person aggrieved by an order of the Board to institute a proceeding on his own behalf to have it modified or set aside—and also by requiring that, if the order shall be held invalid in a proceeding instituted by the Board, the court shall set it aside and not merely refuse to enforce it—Congress has clearly recognized that the interest of a person aggrieved by such an order in having a judicial determination of its validity or invalidity is not merely a defensive interest, but is an affirmative one. It seems absurd for the Board to contend that the right to a decree "setting aside" the Board's order is not a right to affirmative relief, such as to bar a voluntary dismissal, when such relief can be the sole object of a suit initiated by the aggrieved person.

Although petitioner's contentions in this respect are based upon no novel doctrine, such contentions receive added support from a clearly marked tendency in the cases to recognize that a person may have an affirmative interest in obtaining relief which has no other effect than to be *res adjudicata* of an issue between the parties, upon which the plaintiff may, but has not as yet, brought suit. Thus a person accused of infringement of a patent may sue under the Federal Declaratory Judgment Act for a judgment declaring that no such infringement exists or that the patent is void.

Zenie Bros. v. *Miskend,* 10 F. Supp. 779;
Mitchell & Weber, Inc. v. *Williamsbridge Mills,* 14 F. Supp. 954;

Link-Belt Co. v. *Dorr Co.*, 15 F. Supp. 663; *Cf.* Borchard, *Declaratory Judgments* (1934), p. 68.

On the other hand, a defendant may counterclaim for a declaratory judgment, and such a counterclaim will bar the right of the plaintiff to have a voluntary dismissal. See *Meinecke* v. *Eagle Druggists Supply Co., Inc.*, 19 F. Supp. 523, 525; *Link-Belt Co.* v. *Dorr Co.*, *supra*, at 664. Of course, the prejudice which would result to defendant from a voluntary dismissal where defendant has counterclaimed for a declaratory judgment is removed when, prior to the motion for dismissal, defendant has already instituted a direct suit of his own to enforce the same rights which he has set up in his counterclaim. *Aetna Life Insurance Co.* v. *Wilson*, 84 F. (2d) 330, relied upon by the Board.

In *Bronx Brass Factory, Inc.* v. *Irving Trust Co.*, 297 U. S. 230,* where a trustee in bankruptcy successfully opposed voluntary dismissal of a claim, his sole interest in having the claim expunged on the ground of an unlawful preference was to obtain a decision on the issue of preference, which would be *res judicata* in a subsequent plenary suit by the trustee to recover the assets which were the subject of the preference.**

Moreover, even if what petitioner has asked for and is entitled to in this case were not affirmative relief, the case would fall within another well-established exception

*Affirming *In re J. R. Palmenberg Sons*, 76 F. (2d) 935.

**It is necessary for a trustee in bankruptcy to bring a plenary suit to recover such assets. *Breit* v. *Moore*, 220 Fed. 97; *McCulloch* v. *Davenport Savings Bank*, 226 Fed. 309; *Lincoln* v. *People's National Bank*, 260 Fed. 422.

to the rule permitting voluntary dismissals, namely, that where the continued existence of the plaintiff's unadjudicated claim is prejudicial to the defendant's business, a dismissal without prejudice will not be permitted over the defendant's objection.

This rule is an application of the broad doctrine as to voluntary dismissals stated in *Ex parte Skinner & Eddy Corp., supra* (265 U. S. at 93), in the following quotation from the *City of Detroit* case:

> "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co.* v. *Union Rolling-Mill Co.*, 109 U. S. 702. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

A. C. Gilbert Co. v. *United Electrical Mfg. Co.*, 33 F. (2d) 760, is a case in point. The suit was for infringement of a patent. The answer set up no right to affirmative relief, but alleged want of equity in the bill on the ground that plaintiff had been guilty of an unfair trade practice in that it had sent letters to customers and potential customers of the defendant asserting that the products of the defendant were infringing the plaintiff's patents and advising of the institution of the suit. Before the case came to trial the plaintiff moved for a voluntary dismissal, stating as the reason for such dismissal one which a court would ordinarily find persuasive, namely, that after the commencement of the suit the plaintiff had instituted a

suit on the same patent in the District Court of Connecticut against one of defendant's customers; that it was not necessary to have two suits pending and that it preferred to prosecute the suit in the latter jurisdiction, where its principal place of business was located.

The court refused to permit dismissal, saying (p. 762) that it was clear

> "that a dismissal of this bill without prejudice would deprive the defendant of substantial rights and equities arising from the conduct of the plaintiff mentioned, and that the defendant is equitably entitled to meet the plaintiff, on the merits of the issues raised by the plaintiff, in the legal contest to which it has been thus publicly challenged."

In other cases involving patents, but in which the defendant claimed no affirmative relief, it has been held that the defendant's interest in obtaining an adjudication of plaintiff's patent as either valid or invalid, in order that it may carry on its business either in conformity with plaintiff's rights or free from restrictions, as the case may be, is sufficient to justify a refusal to grant the plaintiff a voluntary dismissal.

Churchward International Steel Co. v. *Carnegie Steel Co.*, 286 Fed. 158;

Hills v. *Federal Optical Co.*, 295 Fed. 213;

Bassick Manufacturing Co. v. *Seltzer*, 37 F. (2d) 579;

Dooley Improvements, Inc. v. *Motor Improvements, Inc.*, 6 F. Supp. 161;

Lunati v. *Marnall Steel Products Co.*, 10 F. Supp. 282.

It seems almost unnecessary to point out that the present case is one in which the petitioner has a vital interest in having its rights determined, since under the Board's order it stands convicted of unfair labor practices, and such order has been widely publicized. The continued pendency of the proceeding, after the Board has once made a decision against petitioner, necessarily affects it adversely, and such effect would be in no way dispelled by the Board's taking the case back and setting aside its order in order that "questions concerning the validity of the Board's procedure" may be "obviated on the transcript of record" (R. 37-38) and another order made.

The authorities cited show that the order below was erroneous, even apart from the provisions of the Act. In addition, as we have pointed out, the action of the court below was contrary to the purpose and intent of the Act and inconsistent with its express provisions.

POINT II

The order in petitioner's case (No. 183) remanding the case to the Board was erroneous and should be reversed.

When on May 2, 1938, the Board moved for leave to withdraw its petition for enforcement in No. 182 (R. 36), it took the position that the relief which petitioner had asked for in its answer and was entitled to under the Act was not "affirmative relief". If the Board's argument were correct, it could only mean that a respondent in a proceeding under Sec. 10(e) remains in court only at the pleasure of the Board, and must file its own suit under Sec. 10(f) if it is

to have the right to insist that the court exercise its statutory jurisdiction to decide the controversy.

Hence the logical answer to the Board's position, and the logical next step in petitioner's efforts to get its rights adjudicated, was the filing of its own petition under Sec. 10(f). Accordingly, petitioner filed such petition with the court below on May 4, 1938 (R. 62).

In view of the position thus taken by the Board, it is difficult to understand its description of petitioner's petition to review as "redundant", with the implication that for redundancy it may be disregarded. Such a suggestion is wholly inconsistent with the position of the Board in No. 182, since it amounts to a concession that petitioner's answer in No. 182 entitled it under the statute to the same affirmative relief it could obtain by petition to review in No. 183. If such was the Board's view, its proper motion was to dismiss the petition in No. 183, as being surplusage in view of the prayers contained in the answer in No. 182. It made no such motion, and has not applied for a writ of certiorari to review the orders by which the court below assumed and exercised jurisdiction of the petitioner's case.

The court below did not find the petitioner's petition "redundant". On the contrary, it assumed jurisdiction thereof in accordance with the Act. Having on May 5, the day after the petition was filed, granted leave to the Board to withdraw its case (No. 182), the Court on May 9 entered an order in the Board's case and another order in the petitioner's case, the combined effect of which was to recognize that jurisdiction of the petitioner's case attached as of May 4 and to impound the record in No. 182 for use in No. 183.

Specifically, as stated above, the Court's May 9 order in the Board's case annulled that part of its May 5 order which would have allowed the Board to withdraw the certified transcript from the files, leaving outstanding only the permission to the Board to withdraw its petition; and the order of May 9 in the petitioner's case confirmed the Court's jurisdiction thereof as being effective from May 4, by ordering that the transcript of record should be deemed to have been filed in No. 183 as of the time of the filing of the petition, *i.e.*, as of May 4.

When on June 2 the Board made its motion that the Court "issue an order remanding the case to the Board for further proceedings" (R. 103), it stated its purpose as follows (R. 103-4):

> "2. In addition to the completion of the proceedings pending before the Board and of the record thereof, the granting of the motion herein would result in *obviating* upon the record *certain* questions sought to be raised by the Company concerning the validity of the Board's order, * * *. Should the instant motion be granted, the Board *now advises the court* that it will forthwith set aside its findings and order of December 22, 1937, issue proposed findings to which the parties will be permitted to file exceptions, and if they so desire argue objections before the Board, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as may be deemed advisable."*

On June 10, 1938, the court handed down an order in which, among other things, it granted the motion to remand in the following language (R. 108):

*Italics ours.

> "The motion of respondent filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted."

A. The jurisdiction of the court below having attached, the Act required it to proceed to a determination of the case and precluded it from "remanding" the case to the Board without such determination.

When the Board's motion to remand was made, the petition to review and set aside the Board's order had been duly filed and notice thereof had been given in accordance with the statute; the transcript of record as certified by the Board had been filed in petitioner's case (R. 80), and the provisions of Sec. 10 (f) were fully applicable:

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction * * * in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; * * *."

Under this provision, if the court's action in permitting withdrawal of the petition in No. 182 made that petition inoperative as a basis for the jurisdiction of the court over the proceeding, the filing of the petition and record in No. 183 was effective to retain in the court the exclusive jurisdiction for which Sec. 10 (f) provides. It was therefore mandatory upon the court to proceed to a decision of the

petitioner's case, and it had no power under the Act to remand the case to the Board without deciding the issues raised by the petition.

(1) *The order below was not a "remand" but was an abdication of the court's statutory jurisdiction.*

By granting the Board's motion to remand the petitioner's case to the Board, the court divested itself of jurisdiction and surrendered it to the Board. The proceeding is statutory, and the powers of the court must be found in the Act. It will not be contended that the Act in express terms authorizes the court thus to divest itself of jurisdiction.

Nor may such power be implied. On the contrary, the Act contemplates that the court, once its jurisdiction has attached, shall proceed to an affirmative decree in favor of one party or the other.

While, as we have stated, the Board referred to the decision of this Court in the *Morgan* case in connection with its motion, it did not by answer or otherwise admit those allegations of fact in the petition which, if true, would bring the order within the *Morgan* case. Had it done so, the petitioner would have been entitled to a decree setting the order aside.* Nor did it move to dismiss either upon the ground that the petition failed to state a cause of action or that the court was without jurisdiction. On the contrary, its motion to "remand" necessarily confessed both the sufficiency of the petition and the jurisdiction of the court. Neither confessing error nor challenging the sufficiency of the complaint, the Board moved that the case be remanded

*The authorities are cited *infra*, pp. 46-57.

to it upon the ground that the granting of the motion "would result in obviating upon the record certain questions sought to be raised by the Company concerning the validity of the Board's order" by permitting the Board to take further proceedings and enter a new order (R. 104).

The granting of this motion amounted to a dismissal of petitioner's case on motion of respondent, not because of any defect in petitioner's case but merely because respondent does not wish to litigate the issues as made. As we have already pointed out, a plaintiff, according to the established usages of judicial proceedings, may not be permitted to discontinue his suit without prejudice where the defendant has prayed for affirmative relief. Even more extraordinary is the theory, implicit in the action of the court below, that a court, upon motion of a defendant, may order the plaintiff's case to be discontinued or dismissed, except upon a motion to dismiss for lack of jurisdiction, for failure to state a cause of action, or upon some other kindred ground.

The Board asserts that a reviewing court has a general "inherent" power to remand a case to an administrative tribunal whenever it sees fit. As we show below, there are no authorities to support the existence of a power so vague and nebulous, and so entirely inconsistent with the statutory scheme. The existence of any such power, prior to decision of the case, would defeat the provisions of Sec. 10(d) of the Act, terminating the Board's jurisdiction upon the filing of the transcript of record; the provisions of Sec. 10(e) and Sec. 10(i) conferring upon the Court exclusive and plenary jurisdiction upon the filing of such transcript, and the provisions of Sec. 10(f) conferring upon any person aggrieved by an order of the Board an unqualified right to judicial review thereof. Moreover, as we have pointed out

under Point I, the only provision which the Act contains, whereby further proceedings may be had before the Board, is the provision for the taking of additional evidence before the Board, for good cause shown to the court. Even in this connection, however, power in the Board to set aside its order and make a new one is expressly withheld. Its authority is confined to the filing with the court of "its recommendation, if any, for the modification or setting aside of its original order", by reason of such additional evidence (Sec. 10(e)). Power to modify or set aside remains exclusively with the court. By thus limiting the powers of the court and Board, the Act clearly negatives the existence of any power in the court to remand the case to the Board for any reason, before the court has decided the case, and also clearly negatives the asserted power of the Board to set aside its own order after a court has acquired jurisdiction, and to make a new order after further proceedings nowhere provided for in the Act.

Had Congress intended to confer power upon the court to remand the case to the Board or to provide for further proceedings before the Board of any description other than as now provided for in the Act, it would have made express provision therefor in the Act. See

United States v. *Pennsylvania R. Co.*, 242 U. S. 208, 231;

United States v. *Louisville & Nashville R. Co.*, 236 U. S. 318,

If the court was empowered in petitioner's suit to remand the case to the Board and divest itself of jurisdiction, in order that the Board might obviate the issues referred to in its motion, then it must follow that the court is empow-

ered so to remand any case under Section 10 of the Act for the purpose of permitting the Board to proceed further and obviate the determination of *any* issue which the Board may desire to obviate.

In this particular case the Board requested the court to divest itself of jurisdiction and remand the case to the Board for the purpose of permitting the Board to take further proceedings in compliance or pretended compliance with the decision of this Court in the *Morgan* case, and to enter a new order. Failure to accord to the respondent in a proceeding before an administrative tribunal that "full, fair and open" hearing which the law requires is not the only ground upon which an order of such a tribunal may be set aside. As said by this Court in *Morgan* v. *United States*, 298 U. S. 468, 480:

> "There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & Southern Ry. Co., supra.** Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order."

It will scarcely be contended that if in a petition to set aside an order of the Board it was alleged that the order was invalid upon any or all of the grounds stated, the court upon motion of the Board could, instead of determining the issues thus raised, divest itself of jurisdiction and remand

*265 U. S. 274.

the case to the Board for the purpose of permitting it to "obviate" or "eliminate" such issues.

Assume, for example, a case in which the petition alleges the order to be invalid because of the absence of findings sufficient in law to support it. This contention being thus directed to the attention of the Board, the Board concludes that there may be doubt as to the sufficiency of the findings made; but without conceding them to be deficient it moves the court to divest itself of jurisdiction and remand the case to the Board to enable the Board to set aside its order and make new findings and a new order, thus "obviating" or "eliminating" the issues raised in respect of the order sought to be set aside.

Or assume that the Board has made a finding alleged by the petition to be unsupported by evidence. The Board, reviewing the evidence in the light of the petition, reaches the conclusion that there may be danger that the court would so hold. It also reaches the conclusion that the fact found, although erroneously considered by the Board in the making of its order, is not essential to its final conclusion. It therefore moves the court to divest itself of jurisdiction in order that it may itself set aside the order, eliminate the finding in question and make a new order.

Not only does the Act contemplate no such procedure but the common experience of all men suggests how easy it would be for a tribunal which is also an interested party, once having arrived at a conclusion, to believe that it would have arrived at the same conclusion if it had not made the finding under attack, or that it would have made the findings which are lacking had it considered them.

If the Board had the right which it claims to divest the Court of its jurisdiction, then the Board's orders would

become nothing more than trial balloons. If they met with no opposition they would be enforced. If the respondent had the means and the inclination to oppose the Board, and set up meritorious defenses, the cases could be taken back for more careful consideration. A rule which would permit this sort of practice would obviously be against public policy, for it would encourage administrative excesses and administrative carelessness, would permit administrative proceedings to be prolonged interminably, and in effect would deny judicial review except at the will of the administrative body.

(2) *The court below had no power to "remand" the case without deciding it and setting aside the Board's order.*

The order below was not a "remand" in any proper sense of the word but was an order dismissing petitioner's petition upon motion of the Board and over petitioner's objection, although the Board's motion did not charge that petitioner's petition failed to state a cause of action or that the court was without jurisdiction or any other grounds which would support a dismissal.

It is necessary to distinguish between a "remand" resulting from the exercise of the mandatory functions of an appellate court with respect to an inferior court and a "remand" resulting from the quite different function of a court invested with statutory authority to pass upon the validity of administrative orders. Even where a federal court has decided the issues on review of an administrative order and has held it invalid *and set it aside*, the entry of an order purporting to "remand" the proceeding to the

administrative body does not effect a "remand" in the ordinary sense of the word.

A constitutional Federal court, upon which jurisdiction has been conferred to review the orders of an administrative tribunal, does not sit as a supervisory administrative tribunal. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. It is without authority either to give directions to such a tribunal or surrender its jurisdiction thereto. *Cf. Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 278.

Decrees of federal courts purporting to "remand" administrative proceedings to administrative bodies in fact do not do so. Such an order of "remand" recognizes the propriety of further action by the administrative body but does not require the administrative body to do anything. It is merely a declaration that further action by the administrative body, if it is to be approved by the court upon subsequent review, must be consistent with the law as laid down by the court in passing upon the administrative order. In such a situation, the actual order of the court is that the administrative order be set aside.

In *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co., supra,* this Court was called upon to construe the meaning of "remand" under a statute providing for review on questions of law of orders of the Federal Radio Commission. It said (at p. 278):

> "* * * When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or

> controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Commission, 'it shall remand the case to the Commission to carry out the judgment of the Court' means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law."

It is clear, therefore, that an order of remand prior to a decision of the case is a contradiction in terms; that a condition precedent to an order "remanding" a proceeding to an administrative body is that the court shall determine the legal question whether the administrative body has acted within the limits of its authority and, if it has not, shall reverse the decision or set aside the order of the administrative body. The "remand" is merely a declaration that the decision is without prejudice to further proceedings consistent with the law as determined by the court.

Therefore, although in some cases this Court has "remanded" administrative proceedings to an administrative body, in each such case the Court has made a determination as to the validity of the administrative order, has laid down rules of law to guide the further proceedings of the administrative body, and has either *set aside the administrative order* or taken action which is the equivalent thereof.*

Even when sitting in a purely appellate capacity to review the orders or decrees of a District Court, to which it may remand cases and to which it may give directions,

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*See cases cited and discussed *infra*, pp. 50-57.

a circuit court of appeals may not remand a case to the district court, with either direction or permission to take further proceedings, and thereafter enter a new decree, if it sees fit, *without itself first setting aside* the decree or order appealed from. *Duke Power Company* v. *Greenwood County*, 299 U. S. 259, 268. Much less may a court, without specific statutory authority, surrender its jurisdiction to an administrative tribunal and thus escape performance of the judicial function imposed upon it. It is concerned only with the validity of the order before it. If valid, it is required to enforce it; if invalid, to set it aside. Only if the order be held invalid and be set aside on grounds not inconsistent with further action in the proceeding may there be a "remand" even in the loose sense.

The order of the court below remanding petitioner's case to the Board was, therefore, not a remand in the sense in which remands have been made by federal courts either after reviewing administrative orders or after reviewing action of inferior courts, but is in fact an order dismissing petitioner's petition for a review of the Board's order, over petitioner's objection, and without any claim on the part of the Board that petitioner's petition fails to state a cause of action or is defective on any other ground which could be the basis for a dismissal of the petition.

The order of remand is, therefore, expressly contrary to the provisions of Sec. 10 (f), which confer upon any person aggrieved by an order of the Board the right to obtain a review thereof. If the order be sustained, Sec. 10 (f) of the Act is a nullity and a person aggrieved by an order of the Board has in fact no right to obtain a review thereof by a court except when, as and if the Board shall be willing to submit to the court's jurisdiction.

B. The authorities cited by the Board do not support the order of remand. On the contrary, these and other authorities show that the court was clearly in error in sending the case back to the Board without determining the issues raised by the answer.

The Board's analysis of the authorities might lead one to suppose that reviewing and appellate courts have an indiscriminate and arbitrary power to remand any case, at any stage, and for any reason, to an administrative tribunal or lower court, upon application of such tribunal or court or of any party to the litigation. Actually, the judicial procedure governing remands is not in so chaotic a state; the applicable principles of law are well settled; the function of a remand may be defined quite precisely, and the general power which the Board has argued for does not exist.

The only direct authorities cited by the Board, *i.e.*, those involving administrative orders, give no support to its argument because they are all cases in which the reviewing court fully discharged its function to decide the issues and then either (a) held the administrative order invalid and did not remand the case (the invalidity of the order being incapable of correction) or (b) set aside the order and remanded the case to the administrative body so that it might, if it chose, proceed according to law. These cases are:

Texas & Pac. Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197;

Southern Ry. Co. v. *St. Louis Hay & Grain Co.*, 214 U. S. 297;

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568;

International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291;
Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212.

A brief consideration of these cases will make clear the function of the "remand" in proceedings to review administrative orders.

In the *Texas & Pacific* case, the Commission on its own motion, and without a hearing, made an order requiring that inland tariffs should apply to all imported articles transported in the United States, thus forbidding through rates from foreign ports to points of destination in the United States. Thereafter, upon a hearing limited to the question whether they had violated this general order, a cease and desist order was issued against certain carriers and suit was brought by the Commission to enforce it.

The decision of the case turned on a legal question—whether the Commission could take into consideration the ocean voyage of imported goods as constituting a difference of "circumstances and conditions" justifying a difference in rates from those applicable to inland traffic. The trial court adopted the Commission's view that it could not take such facts into consideration, and upheld the order. The circuit court of appeals disagreed with this conclusion, but affirmed the judgment on the ground that the existing disparity in rates was too great to be justified by the difference of "circumstances and conditions", and hence that the rates were discriminatory.

This Court reversed and remanded the case to the circuit court with directions to dismiss the bill, agreeing with the circuit court of appeals on the legal question but dis-

agreeing as to the conclusion which followed therefrom, and holding that, by passing upon the question whether the rates complained of were in fact discriminatory, the circuit court of appeals had gone beyond its judicial powers and exercised a fact-finding function which belonged to the Commission. The respective functions of the Commission and the courts were defined as follows (at p. 238):

> "If the Circuit Court of Appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to *reverse the decree, set aside the order,* and remand the cause to the Commission, in order that it might, *if it saw fit,* proceed therein according to law."*

It is obvious that the Board's much abridged quotation (Br. in Op. to Cert., p. 15) gives a totally wrong impression of what the case decided.

Southern Ry. Co. v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, was a suit at law to recover reparations awarded by the Commission, based upon a decision that a certain charge for reconsigning shipments of hay was discriminatory. In fixing the fair rate, the Commission held that the carrier should perform the service at cost.

This Court reversed a judgment for the plaintiff, holding that the carrier was entitled to a profit on the service. Pointing out that the testimony before the Commission was not in the record, and that the Court could not itself determine what rate would be fair, the Court said (at p. 302):

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*Italics ours.

"All we can do is to reverse the judgments of the Circuit Court and the Circuit Court of Appeals and remand the case to the former court with instructions to send the matter back to the Commerce Commission for further investigation and report."

Since the Commission was not a party to the case, all that this could mean is that the complaint would be dismissed and further steps in the rate controversy left up to the Commission. In other words, the obvious purpose of the "remand" was to avoid a final determination adverse to the plaintiff, thus permitting him at some later date to recover the proper amount of reparations if the rates paid by him were actually higher than a fair rate properly computed, and to permit the Commission to re-determine the rates on a proper basis and make an award of reparations to the plaintiff if he was entitled thereto.

It will be noted that in this case, as in all the others here cited, the Court did not relinquish any part of its own jurisdiction but decided all the issues that it was within its province to decide, and all that it was able to decide on the record before it.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, far from supporting the Board's contentions is an almost conclusive answer to them. The Federal Trade Commission had issued an order that respondent cease and desist from making or enforcing agreements prohibiting its wholesalers from selling the magazines of other publishers. It was held by both the Circuit Court of Appeals and by this Court that the Commission had failed to make findings on material issues of fact; and the Government argued that in such a case the proper course was to remand the case to the Commission with instructions to

make findings of fact on such issues. The Court held that such a "remand" would be futile because findings necessary to sustain the order would be without support of substantial evidence in the record and concluded (p. 582):

> "In the present cause the Commission has not found all the material facts, but considering those which it has found and the necessary effect of the evidence, the order to desist is clearly wrong and should be set aside without further delay."

It is this power of the court to dispense with a useless "remand" which might properly be designated by the Board's phrase—a "power to expedite".*

The Court stated the governing principle as follows (at p. 580):

> "If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do."**

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*Br. in Op. to Pet. for Cert., page 15.

**Three judges doubted whether this statement clearly expressed their view of the law, although they agreed with its application in the particular case—their point being that a case should always be sent back to the Commission for additional findings of fact if the findings were insufficient and there was evidence in the record which might support the missing findings; that otherwise the courts would be taking over a part of the fact-finding function of the Commission (see 760 U. S. at 582).

It is apparent from this language that whatever power the court may have to remand it is not a "power to expedite", but is a power to take procedure which preserves the distinction of functions between the administrative body and the courts, even though it results in delay. It is this distinction of functions which the Board now seeks to obliterate by asserting a power to halt the process of judicial review whenever it decides that it would like to take further proceedings in the case.

In *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, the court denied enforcement of the order of the Commission but did not "remand" the proceeding because the defect in the order was fundamental and incapable of cure.

In *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, the Commission ordered respondent, a blender of flour but not a miller, to cease and desist from doing business under a corporate name which included the words "milling company". This Court reversed a decision of the circuit court of appeals denying enforcement of the Commission's order, but held that the Commission had gone too far in requiring the respondent to give up the use of an established and valuable trade name, since the public interest could be protected by requiring the use of qualifying words to show that the respondent was not a miller. It therefore sustained the Commission's order in all particulars except as respects the corporate name, and remanded the case to the Commission so that it might "upon consideration of the present record and any further evidence which it may conclude to take" determine the "form and manner" of a representation which the re-

spondent would be required to use with its corporate title in order to make clear that it was not a miller (p. 218).

Here is an example of remand of a case so that administrative discretion might be exercised upon a subject as to which discretion had been conferred by statute on the administrative body.

From these cases it will be seen that the remand of a proceeding to an administrative body can never occur until the process of judicial review has been completed, and then only if the decision of the court, having adjudged the administrative order invalid and set it aside in whole or in part, does not dispose finally of the controversy but leaves the administrative body with a function still to perform.

There is no shred of support, either in the cases cited or elsewhere, for the proposition that a remand of the proceeding may be resorted to by the court in order to avoid decision of the case and substitute further administrative procedure for the judicial review which is provided for by the statute.

Other cases supporting the propositions set forth above are:

Louisville & Nashville R. Co. v. *Behlmer*, 175 U. S. 648, 675;

Saginaw Broadcasting Co. v. *Federal Communications Commission*, 96 F. (2d) 554;

Tri-State Broadcasting Co. v. *Federal Communications Commission*, 96 F. (2d) 564;

Heitmeyer v. *Federal Communications Commission*, 95 F. (2d) 91.

The foregoing authorities—involving judicial review of administrative orders under other statutes—fully sup-

port petitioner's construction of the Act, namely, that Congress contemplated a single proceeding in which the powers of the Board under Sec. 10(a) to (d) come to an end with the shift of jurisdiction to the court (*i.e.*, upon filing of the transcript of record), and that any subsequent exercise of jurisdiction by the Board must be confined to

(a) the statutory procedure for taking additional testimony under direction of the court, modifying findings and making recommendations for modifications of the order, and

(b) if the Board's order be set aside, such further proceedings, not inconsistent with the court's decision, as the Board may find it necessary to take in order to perform the duties imposed upon it by law; for example, if the Board has failed to make necessary findings which, if made, would be supported by the evidence (*cf. Federal Trade Commission* v. *Curtis Publishing Co., supra*); or if the Board has misconceived the scope of relief which it is permitted to give and the court "remands" the case to the Board for reconsideration of the matter and exercise of the discretion which the Act imposes upon the Board in respect of the granting of affirmative relief. *Cf. Federal Trade Commission* v. *Royal Milling Co., supra;* and see Sec. 10(c) of the Act.

In the present case the court did not set aside the order of the Board or make any determination with respect to the validity or invalidity thereof but, upon the mere statement of the Board that it wanted the case back, washed its hands of it without determining anything.

The Board's alleged analogous cases, if in point, do not support its contention.

(a) *Remand by an appellate court at the request of the lower court.*

The Board has asserted, and has cited certain cases to support, the following broad proposition:

> "An appellate court may return a record to a lower court on the application of the latter so that further proceedings or a rehearing may be had below, without deciding the merits." (Br. in Op. to Cert., p. 17.)

From the statement of this proposition it might appear to be the Board's view that an appellate court has a general and indiscriminate power to return a record to a lower court, at any stage of the proceedings on appeal, whenever the lower court asks to have the case back in order to change its decision or to take further proceedings to correct its own errors.

No such proposition is supported by the cases cited by the Board, or by any other cases.

The scope of the rule may be seen from a consideration of *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902,* the only case cited by the Board in which it was actually applied.

In that case, a suit by a seaman for personal injuries, the defendant pleaded a previous decree in admiralty and upon such plea the district court dismissed the complaint. Plaintiff took a writ of error, but while it was pending, and before the term of the district court had expired, asked the district court for reargument on the question of law in-

*Reversed on grounds not here relevant, 274 U. S. 316.

volved. The district court thereupon requested the circuit court of appeals to return the record so that it might reconsider this question, and the record was accordingly returned. Then the district court vacated its judgment and, after trial, gave judgment for the plaintiff. This procedure was sustained on appeal on the authority of a *dictum* in *Roemer* v. *Simon*, 91 U. S. 149, in which the entire opinion of the Court was as follows:

> "It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here. Rev. Stat. sect. 698. The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule, 88. It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause. Should such a request be made, we might, *in a proper case* and *under proper restrictions*, make the necessary order; but we cannot make such an order on the application of the parties. The court below alone can make the request of us. The application of the parties must be addressed to that court, and not to us."*

In the other cases cited by the Board, the "remand" or similar relief sought by the appellant was denied on the

*Italics ours.

granting of it by the appellate court held erroneous, upon the grounds indicated in the parenthetical explanations below:

Realty Acceptance Corp. v. *Montgomery*, 284 U. S. 547. (No power in appellate court to remand for the purpose of introducing newly discovered evidence because there was no power in trial court, its term having expired, to re-open the proceedings for the receipt of such evidence.)

Hall v. *United States*, 78 F. (2d) 168. (No power in the circuit court of appeals to grant a new trial for newly discovered evidence, and no such power in the trial court while the appeal was pending; proper procedure would have been for the trial court to request the circuit court of appeals to return the record so that, before the term of court expired, the motion for a new trial might be considered.)

It is apparent that these cases establish no more than that, after an appeal has been filed and before the term of the lower court has expired, the appellant—as an alternative to dismissing his appeal and then applying to the lower court for further proceedings—may accomplish the same result (and at the same time protect himself from loss of his right to appeal by refusal of the lower court to entertain his application*) by presenting to the lower court his rea-

*That this is the correct interpretation of the cases is shown by the fact that, when the application by the lower court for the return of the record has been made on appeal from an interlocutory decree —so that a dismissal of the appeal would not deprive the plaintiff of his right of appeal at a later stage of the proceedings—the courts have not returned the record to the lower court but have instead dismissed the appeal without prejudice to further proceedings. *Mossberg* v. *Nutter*, 124 Fed. 966; *Wagner* v. *Meccano, Ltd.*, 235 Fed. 890; *cf. Greene* v. *United Shoe Machinery Co.*, 124 Fed. 961.

sons for wishing such further proceedings to be taken and having that court request the appellate court to send the case back so that it may take such proceedings.

The cases just discussed would sustain the Board's position only if they held that, where the defendant appeals from an adverse decision, the *appellee* (corresponding to the Board in its capacity of prosecutor and party) and the court (corresponding to the Board in its judicial capacity) may ask for and obtain from the appellate court a return of the record *over the appellant's objection* so that some of the "questions" raised by the appellant's assignments of error may be "obviated on the transcript of record" before the appeal is decided by the appellate court. Obviously they hold no such thing. In every one of the cases the appellant was the moving party and the action taken by the court was for his benefit. There is nothing in the cases to suggest that an appellee may procure a remand of the case for the purpose of further proceedings before the trial court designed to correct errors assigned by the appellant on his appeal.

The foregoing cases uniformly hold that when the lower court's power to modify or set aside its decree has come to an end by expiration of the term of court at which the decree was made, a remand of the case or return of the record, without decision of the appeal, would be useless and therefore may not be had. This suggests a close analogy. The power of the Board to modify or set aside its orders is precisely defined by Sec. 10 (d) of the Act, and under the express provisions of that subsection such power exists only

> "*Until* the transcript of record has been filed in a court * * *".

That time had expired when the court below made its order of remand. The purported remand was therefore a futile thing, incapable of restoring to the Board a power which the statute had already taken away from it. Hence on this ground alone the order of the court below was clearly erroneous.

(b) *Remand by an appellate court without application by the trial court*

The Board has also asserted, and has cited certain cases to support, the following equally broad proposition:

> "Even without such an application [*i.e.*, an application by the trial court for the return of the record] an appellate court may remand to the lower court for further supplementary proceedings without deciding the appeal."

Here again the Board states its proposition so broadly that one might suppose that an appellate court has a general and indiscriminate power to remand a case to a lower court, at any stage of the proceedings on appeal, whenever the appellate court may care to do so, and without deciding anything.

No such proposition is supported by the cases cited by the Board, or by any other cases. The Board has cited:

Ballard v. *Searls*, 130 U. S. 50;
Jensen v. *New York Life Ins. Co.*, 50 F. (2d) 512;
Podlesak v. *McInnerney*, 26 App. D. C. 399.

In *Podlesak* v. *McInnerney*, the District of Columbia Court of Appeals, being unable to arrive at a decision on a

question of priority of invention, sent the case back to the Commissioner of Patents "for further consideration". As the court was not exercising a judicial jurisdiction, but was sitting as an administrative tribunal of the Patent Office, the case is not in point and gives no support to the Board's proposition.

Both *Ballard* v. *Searls* and *Jensen* v. *New York Life Ins. Co.*, are cases involving the effect to be given by the appellate court to a supervening judicial decision in another action involving or affecting the same parties.

In *Ballard* v. *Searls*, the defendant appealed from a decree setting aside a conveyance to him as in fraud of creditors, plaintiff being a judgment creditor. While the appeal was pending, this Court in another action reversed the judgment which gave the plaintiff his status as a creditor, so that, as the Court said, "the whole basis and foundation of the present suit has disappeared" (at p. 53). The Court held, however, that to reverse the decree on that ground would require the exercise of original jurisdiction; and it therefore remanded the case to the lower court with instructions to allow the defendant to file a bill to set aside the judgment by reason of the supervening fact.

Jensen v. *New York Life Ins. Co.*, involving an action to cancel an insurance policy, was somewhat similar, the supervening event being a decision in another action between the same parties, the effect of which could not be determined on the record before the appellate court. The court indicated that there were various methods which it might use to bring into litigation in the action before it the effect of the other judgment, and decided that it would adopt the somewhat unusual procedure of retaining the appeal before it but remanding the case to the trial court

with leave to the insured to have the cause reopened for the filing of a supplemental pleading and the introduction of evidence on that issue.

It is apparent that these cases involve a most unusual type of situation, bearing no resemblance whatever to the present case, and giving no support to the broad proposition asserted by the Board.

In the cases cited and in the numerous other cases of the same kind which might be cited, the appellate court refused to decide the case, because of the absence from the record of facts necessary for a final determination of the controversy, and remanded the case to the lower court because only the lower court had jurisdiction to take the proceedings necessary to make these facts of record.

In the present case, it is not alleged by the Board that any additional facts must be determined, or that any issue has been left undecided which the Board is required to decide. It merely refers to this Court's decision in *Morgan* v. *United States, supra,* denies that the decision has any application to the present case, and asserts that it nevertheless desires to serve an interim report and to permit the respondent to except and argue thereto.

Moreover, if any facts were missing from the record which the Board might desire to bring before the court, whether supervening facts or facts in existence at the time of its report, it would not be necessary to rely on general principles or "inherent powers" to get such facts into the record; for Congress has envisaged the precise situation and has laid down a definite and simple procedure to be followed in the taking of additional testimony—a procedure wholly inconsistent with a "remand" of the case to the Board.

(c) *Recommitting of special masters' reports*

In arguing that a court has an "inherent" power to remand a case to an administrative tribunal for reconsideration thereof whenever the latter so requests, the Board refers to the power of a court of equity to recommit a special master's report for reconsideration, upon application of the special master.* The analogy is presumably used because of the reference in the *Republic* case (*In re National Labor Relations Board*, 58 Sup. Ct. 1001), in which Sec. 10 (d) of the Act was compared with statutes authorizing masters in chancery to modify or recall reports after submission to but before action by the court.

The Board uses the analogy in an entirely different way, and no considerable discussion of the subject of special masters' reports would seem to be required, because the Board's analogy is most remote. The relationship between the circuit court of appeals and the Board, in a proceeding to enforce or set aside the Board's order, bears little or no resemblance to the relationship between the court and the special master whose report has been submitted to the court for confirmation. A special master is a disinterested party and not a litigant. The court's "inherent power" over him is due to the fact that he is an officer of the court, acting pursuant to the court's instructions, in a proceeding which is before the court and over which the court has control. His situation is analogous to that of one of the Board's examiners appointed to hear the testimony and make an interim report.

*Br. in Opp. to Pet. for Cert., p. 17.

The cases cited by the Board are not in point also because we are not dealing with an "inherent" power but with a power created and defined by statute.

But if the cases involving special masters' reports are in any way analogous, they may be referred to for their bearing on a more fundamental issue here presented, namely, the propriety of the Board's sitting in judgment on its own decision when the decision is challenged on the basis of fundamental irregularities in the Board's exercise of its judicial function.

Fitchburg Steam Engine Co. v. *Potter*, 211 Ill. 138, is in point. At a hearing before the court, it was brought out that the Master, without having announced his decision and without notice to the defendant, had granted to counsel for the plaintiff the privilege of framing the findings of fact; that the Master had accepted the findings so prepared together with conclusions of law and a recommendation of a decree in favor of the plaintiff, and with only minor changes in phraseology had filed them as his own report.

The Chancellor did not accept the Master's findings, but entered a decree favorable to the defendant. This was reversed by the intermediate court, which directed that a final decree be entered in accordance with the Master's report. The Supreme Court of Illinois reversed this decision and ordered that proceedings should be instituted *de novo* before a new master.

The Court held that the Master's report should be suppressed because the preparation of his findings and conclusions by an interested attorney was not only a practice of questionable morality, but also because (p. 148):

"It tends to prevent that fair and impartial investigation of the proofs and the law by the master and that more thorough re-examination of the case which would become necessary if the master should discharge his own duties and set forth his own findings. A report so prepared is likely to warp the judgment and discretion of the master and to lead to a biased and prejudiced view of the weight of the evidence, the principles of law applicable thereto, and to induce him to accept and report to the court an erroneous recommendation as to the proper decree to be entered in the cause. Nor does the evil end there, for the findings, conclusions, and recommendation penned by counsel come to the chancellor purporting to be the solemn, official act of the master, to which weight should be given as taken after full and impartial investigation of all the proofs and the principles of law applicable thereto. * * *"

The court next concluded that the conduct of the master prevented re-referenee of the proceeding to him, saying (at pp. 151-2):

"The conduct of the master, which required the suppression of his findings of law and fact and recommendation for a decree, would forbid a re-reference to him. Reference to some other master would become, therefore, the only course to be pursued."

Finally, the court concluded that it would be necessary to begin the proceeding anew before another master, unless the parties should agree to use the proof taken before the former master. The court said (p. 152):

"The objections to the master's report of the proofs challenged the correctness of the decision of the

> master with reference to the admissibility of certain proof, and the newly selected master could not be bound by the conclusion of the former master as to the admissibility of such testimony. Furthermore, the newly selected master, in order to correctly determine contested questions of fact from conflicting oral testimony, ought to have, and would be entitled to have, the aid to be derived from seeing the witnesses and hearing them testify. The benefit of seeing the witnesses and hearing them testify has been repeatedly declared by this court. The master to whom the case is re-referred ought not, except by agreement of the litigants, be directed to report findings of fact and conclusions of law from the proof as reported by the master to whom the cause had been first referred. 'Where a referee becomes disqualified to act, all proceedings upon the trial before him necessarily end, and it is not within the power of the court in appointing a new referee to hear and determine the cause, to compel the new referee to decide the issues upon testimony taken before or rulings made by the referee first appointed.' 17 Ency. of Pl. & Pr. 1085."

It is obvious from the reasoning of the court that, had the master desired to mend his ways, and requested the return of his report for reconsideration, so that he might make his own findings without help from the plaintiff's counsel, the court would have held such recommittal improper because of the inherent difficulty of obtaining a fair decision after the events which had transpired.

Under the allegations of petitioner's petition in the present case, what the Board did in arriving at its findings and order was substantially what the master did in the *Fitchburg* case; and that case is a reminder that the issues raised

by the petition (and by the answer in No. 182) are of such a nature that the correct disposition of them by the courts is of great importance. The case is also a reminder of the absurdity of the Board's claim that it has the right to oust the court's jurisdiction to pass on these issues, and to sit in judgment on itself.

C. The action proposed by the Board purports to meet only one group of objections to the order which have been raised by the petition.

The Board's argument in favor of a remand of the case has been based upon its assertion of willingness to conform to the procedure suggested to it by the opinions in the *Morgan* cases, namely, the filing of a tentative report to which petitioner will be allowed to except and argue, and the making of a new order following such proceedings. It is said that there is no point in the court's deciding whether the failure to follow such procedure in the past was erroneous, since the Board is willing to accord the benefits of such procedure to the petitioner without litigating the point and without an order of the court requiring it to do so. It is suggested that by remanding the case for this purpose the court is exercising a "power to expedite".*

In making this argument, the Board wholly ignores the fact that its proposed procedure meets only one of the issues raised by petitioner in challenging the order.

For example, the allegations of paragraphs 13 to 17 of the petition (R. 66-67), dealing with the conduct of the

*Br. in Op. to Cert., page 15. The phrase seems to have been invented by the Board, as it does not appear in the cases in connection with which it is used.

hearing by the Trial Examiner, raise objections which cannot be cured by the serving of an interim report. They can only be cured either by a dismissal of the entire proceeding and (assuming the power of the Board in the premises) the institution of a new proceeding, or by an entirely new hearing, or by the taking of additional evidence which will permit the petitioner to make its defenses properly and in accordance with the requirements of a fair trial.

If petitioner's contentions with respect to the conduct of the Trial Examiner are valid and are fatal to any order based upon the hearing already held, there can be no point in sending the case back to the Board for the issuance of a tentative report, and the making of a new order, based on that hearing. The Board (while not binding itself even to do that) proposes to take further proceedings based on the record already made. If it does so, and makes a new order based on such record, the same questions as are now raised will have to be passed on by the Court in a subsequent proceeding to enforce or set aside the new order, and the alleged "power to expedite" will prove to be no more than a power to delay the trial of issues upon which the Act entitles the petitioner to be heard now.

If, on the other hand, the errors of the Trial Examiner are not fatal to the proceeding but may be cured by a new hearing or by the taking of additional evidence, then it is clearly improper to send the case back to the Board. If the errors of the Trial Examiner may be cured by the taking of additional testimony, the statute clearly provides that such additional testimony shall be taken pursuant to order of the court, and under the court's jurisdiction, and subject to the court's control over the effect of such additional evidence, and any new findings based thereon, upon the

enforcement, modification or setting aside of the Board's order.

Moreover, the questions which arise at the outset—namely (1) whether or not the errors of the Trial Examiner are fatal to the proceeding, and (2) whether, if not fatal, the proper method of curing them is by a new hearing or by the taking of additional testimony—are clearly questions of law to be passed upon by the court, and not questions which lie within the scope of the Board's functions.

Similar questions of law, clearly requiring a decision by the court, arise under other allegations of the answer.

Paragraphs 18 to 49 allege facts with respect to the conduct of the Board itself in the making of its findings and order (R. 67-72). It is petitioner's contention that such facts, if established, would raise a serious question whether the Board could take any further action in this proceeding. The same question is raised by the amendments to the petition which the petitioner has sought permission to file (R. 81, 106).

Petitioner has made allegations as to the manner in which the prosecuting and judicial functions of the Board were commingled throughout the entire proceeding; and these allegations, if sustained, petitioner would contend would vitiate the entire proceeding before the Board and would require the court to set aside the Board's order with prejudice to any further action in the proceeding (R. 83, par. 35-c).

Petitioner has alleged that the Board in reaching its decision improperly communicated with persons who participated in the prosecution of the case and with other persons having no official connection with the Board, as a

result of which the Board's decision was not based upon the evidence but upon matters extrinsic to the record, political and otherwise (R. 15, pars. 34, 35; R. 70, pars. 35, 36; R. 82-83, pars. 35, 35-a, 35-b, 35-c). These allegations, if sustained, petitioner would contend would require the court below to set aside the order of the Board with prejudice to any further action by the present members of the Board in this proceeding, since the prejudicial effect of such matters would be irremediable.

Petitioner has alleged that the Board entertains a fixed bias and prejudice against petitioner and in favor of the complaining union (R. 106, par. 48-a). These allegations, if sustained, petitioner would contend would require the court below to set aside the Board's order with prejudice to any further action in this proceeding.

Petitioner has alleged that the purported decision of the Board is in fact the decision of its subordinates and that the Board itself gave no judicial consideration thereto (R. 12-17, pars. 17-39, 47; R. 67-72, pars. 18-40, 48; R. 107, par. 38). These allegations, if sustained, petitioner would contend would require the court below to set aside the order of the Board with prejudice to any further decision or order reached in the same manner.

None of the foregoing issues, either as to fact or as to law, can be eliminated from the case by affording petitioner an opportunity to urge before the Board objections to proposed findings. None of them can be "obviated on the transcript of record". Many of them are issues which cannot be determined from the transcript of record. The Board's attempt to withdraw the proceeding from court seeks to avoid a present determination of these issues. Whatever the Board's reasons for seeking to delay such

determination, petitioner will be prejudiced thereby, since it will be subjected to the vexation, delay and expense of further proceedings before the Board which would not be permissible if petitioner's allegations should be sustained; which would be unnecessary if petitioner's allegations should not be sustained, and which in any event would not affect the validity of petitioner's objections or impair its right, if it now has such a right, to a decree setting aside the Board's order on any ground other than the particular objection to which the Board's proposed action is addressed.

It is submitted that it is petitioner's right under the Act to have such issues passed on at once, and not after a further and possibly futile proceeding before the Board.

Even if the sole ground alleged by the petitioner, in its petition in No. 183, for setting aside the order of the Board had been the failure of the Board either to serve an intermediate report and allow the petitioner the right of argument and exception thereto, or in some other manner to meet the requirements of "fair play" referred to in *Morgan v. United States, supra,* the order of remand would nevertheless have been improper; for under all the applicable authorities it would have been the duty of the court to determine whether such failure invalidated the Board's order and, if so, to give legal effect to such determination or, if the Board's willingness to concede the point might be regarded in the nature of a plea of *nolle contendre,* to set aside the Board's order before sending the case back to it for further proceedings.

Such, in our view, would be the principles applicable if the failure to meet the tests of the *Morgan* case were the only issue raised by the petitioner in its answer. When, however—as is the fact here—petitioner has raised other

fundamental issues which the Board has not attempted to meet and by its announced course of action does not propose to meet, there is neither principle nor authority to support the asserted power of the court to abdicate its statutory jurisdiction by remanding the cause for the voluntary correction of one group of alleged errors, without passing upon any of the grounds of invalidity alleged in the petition.

D. The Board's suggestion that the court below did not have jurisdiction of the petitioner's case raises issues which are not before the Court and in any event is without merit.

In suggesting that the court below (in lieu of granting the motion to remand) should have vacated its order of May 9 directing that the certified transcript be deemed filed in petitioner's case, the Board has cast doubt upon the jurisdiction of the court below.* It is suggested:

(1) That petitioner did not itself file the record in its case below, but merely took advantage of "the accident of the physical presence in the files of the court of the record" to obtain the order making the record filed in the Board's case also the record in petitioner's case; and that therefore petitioner did not comply with the provision of Sec. 10 (f) which requires that "the aggrieved party shall file in the court" a transcript of the record;

(2) That between May 5 (the date of the order allowing the Board to withdraw its petition) and

*Br. in Op. to Pet. for Cert., pp. 13-14.

May 9 (the date of the order respecting the filing of the transcript of record in petitioner's case), the Board had "assumed jurisdiction" of "the proceeding". This assumption of jurisdiction the Board claims to have accomplished by serving on petitioner, while its motion to avail itself of the transcript filed by the Board was pending, to wit, on May 6, a notice of its intention to vacate its order and take further proceedings on May 10, "unless sufficient cause to the contrary shall then appear". It is also claimed that the order of May 9 respecting the transcript was ineffective because, the Board's notice of May 6 not being a part of the transcript, there was not on file "a transcript of the entire record in the proceeding" which the statute requires.

It is believed that the Board has no standing to raise these points in this Court. The Board explains its failure to raise them by a petition for a writ of certiorari on the ground that the granting of the motion to remand had "the same practical result" as the granting of the motion to vacate would have had.* The Board's explanation, however, is an admission (1) that it waived any objection to the manner in which the court below obtained jurisdiction in petitioner's case by making its motion to remand, which presupposed that the court had jurisdiction in petitioner's case,** and (2) that, not having petitioned this court for a writ of certiorari to review the order of May 9

*Br. in Op. to Cert., p. 14.

**_Martin's Administrator_ v. _Baltimore & Ohio R. Co._, 151 U. S. 673; _Beyer_ v. _Le Fevre_, 186 U. S. 114.

directing that the certified transcript be deemed filed in petitioner's case or of the order of June 10 refusing to vacate the order of May 9, it has no standing in this court to object to the manner in which the court below obtained jurisdiction in petitioner's case.* The Board, therefore, can be heard before this court in petitioner's case only in support of the order of remand.**

However, the discussion of the Board's jurisdictional points may serve to clarify the issues; and such discussion will show that they are wholly without merit.

1. *The jurisdiction of the court in petitioner's case was complete upon the filing of the petition, independently of the order of May 9.*

We cannot believe that the Board will seriously argue that every aggrieved party who wishes to file a petition under Sec. 10(f), in a court where a petition under Sec. 10(e) or a previous petition under Sec. 10(f) has already been filed, must get a new transcript of record and add that to the court files along with the one already there. Not only would such a rule impose a large and wholly unnecessary expense on both the Government and the aggrieved parties, but it would be contrary to the uniform practice of courts in all analogous situations.

To show to what absurdities such a requirement would lead, let us suppose that the Board files a petition for the enforcement of an order against an employer, and there

*Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 191; Alexander v. Cosden Co., 290 U. S. 484, 487; Peoria Ry. Co. v. United States, 263 U. S. 528, 536; The Maria Martini, 12 Wall. 31, 40-41.

**Peoria Ry. Co. v. United States, supra, at p. 536.

are the following "parties aggrieved" by the order besides the employer:

1. Union A, the complainant in whose favor the case has been decided, but which does not think that the Board has gone far enough and wants the order modified so as to go further—*e. g.*, so as to compel the employer to recognize it as the exclusive representative of the employees.

2. Union B, an unsuccessful party, which wishes to have the order set aside.

3. An employee who has asked for and been denied reinstatement, and who seeks to have the order modified in his favor.

4. An employee who has been granted reinstatement without back pay, and who seeks modification of the order so as to grant him back pay.

5. An employee who has been granted reinstatement with back pay, but who claims a larger amount of back pay and seeks to have the order modified accordingly.

Would any one contend for a moment that the statutory words "the aggrieved party shall file" would require each of these parties upon filing his petition for review to obtain, or the Board to furnish to him, a new transcript of record? It seems to us that the question answers itself; that so futile and wasteful a requirement cannot be attributed to Congress, and hence that the statute may not be construed literally, so as to require filing of a multiplicity of transcripts in the same court, but must be construed in accord-

ance with its substantial purpose, namely, to grant exclusive jurisdiction to the court in which the transcript of record is first filed.

In short, the jurisdiction of the court depends upon the actual presence of the record,* and not upon the question of who has filed it; and once the transcript has been duly filed, it is available to all subsequent parties who seek review of the same order.

If, as we believe, such is the proper construction of the Act, then the exclusive jurisdiction of the court over the petitioner's case was complete on May 4, when its petition was filed and notice thereof given, since the transcript required by the Act was already on file, and all the requirements of Sec. 10 (f) had been fulfilled. The order of May 9, that the transcript should be deemed filed in petitioner's case, was merely confirmatory of the legal effect of the filing of the petition and was a purely procedural order which authorized the clerk of the court to make the appropriate entries on his docket, to give the transcript of record the number of petitioner's case as well as that of the Board's case, and to take such other steps as might be necessary in the internal administration of the court.

There is no statute specifically providing for the use of one transcript of record in two or more proceedings under Sec. 10 of the Act involving the same order of the Board. But one of two things must be true: Either the practice is to be governed by the statutes regulating ap-

*The obvious purpose of the Act, in conferring jurisdiction upon the first court in which the record is filed, is to give the Board a practical control over the choice (where there is a choice) of the circuit court of appeals where the issue shall be litigated. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731.

peals to circuit courts of appeals or, such statutes being inapplicable, the several circuit courts of appeals under their rule-making powers have the right to determine for themselves whether or not a single record is to be used. In either case the contention of the Board must be rejected.

If the matter is a subject to be dealt with by the several circuit courts of appeals, under the statute which empowers them to make rules for their own procedure (U. S. C. A. Tit. 28, § 219), then the court below has ruled in this case that a single record is appropriate, and that the filing of a petition under Sec. 10 (f) makes the record on file available to the petitioner forthwith. For it expressly provided in its order that the effective time of filing of the record in No. 183 should be "the time of filing in this Court by petitioner of its petition to review and set aside the order of the Board" (R. 80), thus clearly expressing its view that jurisdiction of the petitioner's case became complete at that moment of time.

On the other hand, if this matter is not one for the several circuit courts of appeals to rule on, but is to be governed by the statutes regulating appeals and the practice established thereunder, there can be no doubt that the transcript of record as first filed is available to all subsequent parties who seek review or modification of the order. U. S. C. A. Tit. 28, § 864, provides for one record on two or more related appeals to the Supreme Court, and under § 228 of the same Title the provision is applicable to appeals to the circuit courts of appeals.

Cf. Ballew v. *United States*, 160 U. S. 187, 201;

Realty Acceptance Co. v. *Montgomery, supra*, at 550;

Kansas v. *Meriwether*, 171 Fed. 39, 41;
Rederiaktebolaget Amie v. *Universal Transp. Co.*, 245 Fed. 282, 283.

The use of a single record, though so well established that it seldom is the subject of decision, is familiar practice and is uniformly sanctioned.

Gregory v. *Pike*, 64 Fed. 415, 416;
Aberly v. *Craven County*, 70 F. (2d) 52;
United States Trust Co. v. *Western Contract Co.*, 81 Fed. 454, 470;
Hughes, Fed. Prac. § 5734;
6 Cyc. Fed. Proc. §§ 2732, 2801.

The practice has been embodied in Rule 75 (k) of the new Rules of Civil Procedure for the District Courts, recently adopted by this Court.

It is the practice to make use of a single record, and to permit a subsequent party to take advantage of a record already filed, even under a statute or rule which on its face makes the filing of the record by any and every party a condition of the relief sought by that party. For example, under the statute requiring applications for writs of certiorari to this Court to be made within a specified period, this Court has enacted a rule (Rule 38) which provides:

> "The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by Section 8 of the Act of February 13, 1925, * * *."

This rule and the statute are by their terms applicable to each party asking for certiorari in a particular case.

Nevertheless, where one party has filed a petition for certiorari and the record, it has been the uniform practice of this Court not to require subsequent petitioners to file the record, but they are permitted to use the record filed with the first petition. See Robertson, *Practice and Procedure in the Supreme Court of the United States,* page 179.

In the light of these authorities, the court below properly ruled—and certainly had the power to rule—that the transcript of record on file in No. 182 became available to the petitioner immediately upon the filing of its petition in No. 183. If the court had the power so to rule, the correctness or incorrectness of the exercise of such power is not before this Court.

2. *The issuance by the Board of the notice of May 6 had no effect on the jurisdiction of the court.*

The Board's second point respecting the jurisdiction of the court below is based upon the issuance by the Board, on May 6, of a notice which appears at page 54 of the record. It is headed with the title of the proceeding before the Board, addressed to counsel for petitioner, and reads as follows:

> "Please Take Notice that on Tuesday next, May 10, 1938, In the Matter of Ford Motor Company and International Union, United Automobile Workers of America, Case No. C-199, the National Labor Relations Board, unless sufficient cause to the contrary shall then appear, will vacate and set aside its findings and order in said case made December 22, 1937, for the purpose of further proceedings before the Board."

The Board attempts to analogize this situation to the situation presented in the *Republic* case (*In re National Labor Relations Board, supra*), in that it claims that because of its notification of May 6 its order did not thereafter represent its "final action, the review of which the statute provides".

No such analogy exists. The court's jurisdiction of the proceeding was complete in petitioner's case on May 4, when the petition to set aside was filed and the transcript of record was on file in the court. The *Republic* case recognized no power in the Board to defeat a vested jurisdiction of the court by announcing that its order no longer represented its "final action". On the contrary, the opinion in that case is based expressly upon the ground that when the Board decided that its order no longer represented its "final action" the certified transcript of record had not yet been filed in court and there had not yet been the "plenary submission of the cause" to the court which takes place upon such filing; that, accordingly, jurisdiction of the proceeding had not in fact passed from the Board to the court.

But even if jurisdiction did not attach in petitioner's case until May 9, when the court below ordered that the transcript be deemed filed in petitioner's case as of May 4, the situation is entirely different from that presented in the *Republic* case. In that case the Board had never lost jurisdiction of the proceeding, yet the lower court had enjoined the Board from taking any further steps in the proceeding. In this case the Board itself invoked the jurisdiction of the court on January 7, 1938 (R. 1) and on May 5, when the court entered its order granting leave to the Board to withdraw its petition for enforcement and the certified transcript, the court had had jurisdiction of the proceeding

for almost four months; and when such order of May 5 was entered, petitioner's petition for a review and its motions with respect to the filing of the transcript were already on file (R. 62, 39, 78).

It is plain that the court below did not intend by its order of May 5 to divest itself of jurisdiction of "the proceeding" before passing upon petitioner's pending motions as to the transcript, which were returnable May 9, for the court in fact set such motions down for argument on the return day (R. 88). Nor did the Board—though in its opposition (filed May 9) to the petitioner's motion to consolidate the two cases it referred to the May 6 notice—make any contention therein that by reason of such notice the court no longer had jurisdiction of the proceedings.

It is clear, therefore, that the court's order of May 5 cannot be construed as revesting in the Board jurisdiction of the proceeding, and that the parties understood that the order had no such effect.

Finally, the court below on May 9 vacated so much of its order of May 5 as granted to the Board leave to withdraw the transcript, thus exercising its plenary power to alter its own order at the term at which it was made; and the exercise of such power would have been effective even if the Board had attempted to withdraw the transcript during the intervening period, which, however, it did not purport to do.

Moreover, the order of May 5 granting the Board "leave to withdraw" its petition did not require it to do so; and the Board made no attempt to exercise such leave until June 2 (R. 55), two days after this Court denied the petition for rehearing in the *Morgan* case (304 U. S. at p. 23). Had this Court acted otherwise on that petition, the Board

could have chosen not to exercise the leave granted to it, but instead to proceed with the case.

Jurisdiction of "the proceeding" therefore never was returned to the Board, but continued always in the court, regardless of whether jurisdiction attached in petitioner's case on May 4 or on May 9. The Board's order of May 6 was not an order in the proceeding because the Board had no jurisdiction of the proceeding, and no power to make any order therein.

The court's order of May 9 is in no way similar to the injunction against the Board involved in the *Republic* case, but is merely one of three orders which together gave effect to the court's decision to permit the Board to withdraw its own petition but to retain the jurisdiction of "the proceeding", which it had had for four months.

Moreover, if the Board's argument be based on the technical point that (assuming that jurisdiction could not attach until May 9) the record which the court on May 9 ordered to be deemed filed in petitioner's case was not a complete record because it lacked the notice of May 6, the argument is unsound for a number of additional reasons:

First, the Board's notice is not one of the papers which the statute specifically requires as part of the record (*i.e.*, the pleadings, testimony, findings and order). It is not any part of the basis upon which rested the order which petitioner seeks to have set aside, but is a paper which the circuit court of appeals might permit to be omitted from or included in the record, in its discretion. *Cf. Algoma Lumber Co.* v. *Federal Trade Commission*, 56 F. (2d) 774.* The order of May 9 was a proper exercise of such discretion.

*Reversed on grounds not here relevant, 291 U. S. 67.

Second, the notice of May 6 was not in existence when petitioner filed its petition and asked that the record in No. 182 be deemed filed in No. 183; and if a supervening event made necessary the inclusion in the record of an additional paper, it could be included on application of either party or on the court's own motion, under familiar principles. *Clinton* v. *Mo. Pac. Ry.*, 122 U. S. 469; *cf. Sweeney* v. *Lomme*, 22 Wall. 208; *Morgan* v. *Curtenius*, 19 How. 8.

Third, it has never been held that jurisdiction of an appellate or reviewing court depends upon the filing of a perfect record. All that is required is that the record shall be one which has been certified (as the record below has been certified) by the proper officer as the transcript of record in the proceeding; and where the record is incomplete, or where a missing paper is required for the decision of the case, the proper remedy is not a motion to dismiss for lack of jurisdiction but a petition for certiorari to correct a diminution of the record, or the equivalent motion under the practice of the particular court. *Railroad Co.* v. *Schutte*, 100 U. S. 644; *Missouri, Kansas & Tex. Ry. Co.* v. *Dinsmore*, 108 U. S. 30; *State of Kansas* v. *Meriwether*, 171 Fed. 39; *Merriman* v. *Chicago, D. & V. R. Co.*, 120 Fed. 240.

Finally, when the court passed on the petitioner's motion and made its order on May 9, a properly authenticated copy of the notice had been filed in the proceedings by the Board itself, as an exhibit to its opposition (R. 54). As such, it was clearly part of the record before the court and any technical defect in the record had thus been cured.

For the numerous reasons above stated, it is submitted that the Board's suggestion that the court did not acquire

jurisdiction of petitioner's case is devoid of merit, even assuming that the Board has any standing to raise the point in this Court.

POINT III

The orders below should be reversed and the cases remanded to the Circuit Court of Appeals for further proceedings in accordance with Section 10 of the National Labor Relations Act.

Respectfully submitted,

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November 28, 1938.

APPENDIX

Subsecs. 10(d), 10(e) and 10(f) of the National Labor Relations Act

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board.* Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in

*For brevity, the references in this subsection (e) and in subsection (f) to the Court of Appeals of the District of Columbia and to the district courts (which have jurisdiction when the Circuit Courts of Appeals are in vacation) have been omitted.

such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the

Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, * * * by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR THE PETITIONER

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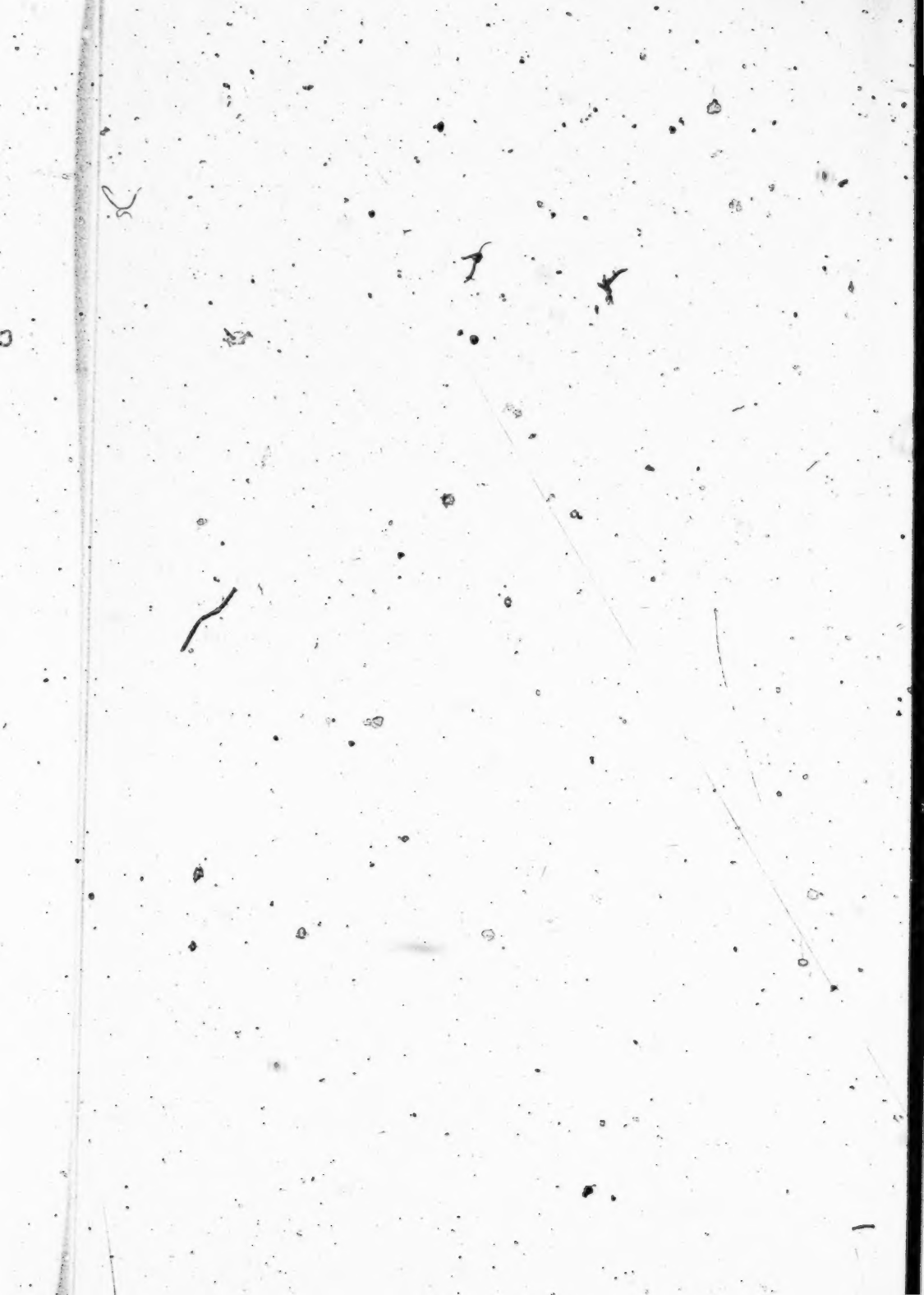

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Supreme Court of the United States

OCTOBER TERM, 1938

FORD MOTOR COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD.	No. 182
FORD MOTOR COMPANY, *Petitioner,* *against* NATIONAL LABOR RELATIONS BOARD.	No. 183

REPLY BRIEF FOR THE PETITIONER

Point I—The Statutory Argument

The Board's brief is remarkable in several respects.

First it is remarkable for the cavalier manner in which it deals with the statute involved in the case. By re-editing our arguments in the manner discussed below, the Board has attempted to remove Sec. 10 (d), (e) and (f) of the Act from their primary place as the determinative factor in the case to a position of comparative unimportance. One would never suppose, from a reading of the answering brief, that this case, like the *Republic* case

> "involves a construction of Section 10(d), (e) and (f) of the National Labor Relations Act, providing for reviews of orders of the National Labor Relations Board." (*In re National Labor Relations Board,* decided May 31, 1938.)

It seems hardly necessary to point out that the meaning of the statute must be sought in the language which it employs; and that if the language be plain, the only function of the court is to enforce it according to its terms. See *United States* v. *Standard Brewery*, 251 U. S. 210, 217; *Caminetti* v. *United States*, 242 U. S. 470, 485.

The meaning of the Act is clear, and the Board confesses the weakness of its position by evading, rather than answering, our statutory argument, which in both cases is our primary reliance, the balance of our argument serving only to confirm the statutory argument and to refute the contentions by which the Board seeks to escape from the plain language of the Act.

Our statutory argument with respect to No. 182 is quite simple: Section 10(d) terminates the Board's jurisdiction when a transcript of the record is filed in a court. Section 10(f) vests the jurisdiction in a court and requires it to proceed to a decree "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board," thus creating a right in the successful party, whether petitioner or respondent, to have the court enter an affirmative decree in its favor.

We say that the asserted right of the Board and power of the court to permit a "withdrawal" of a petition, so that the Board may take further proceedings, is inconsistent with the above-quoted provisions of the Act; is inconsistent with a "plenary submission of the cause" to the court (see *In re N.L.R.B., supra*), and is inconsistent with the other provisions of the Act which prescribe the court's functions and the limitations thereof, and govern the taking of additional testimony. As we point out below, it is also inconsistent with the restrictions

which the Act imposes upon a party opposing the Board's order. (See *infra*, pp. 44-47.)

The Board's "statutory argument" in No. 182

The Board does nothing to refute our analysis of the statute, beyond hinting vaguely at some significance to be attached to the statutory words "the court * * * shall have power," and attempting a *reductio ad absurdum* which is itself grounded in absurdity.

At pages 32-33 of its brief, the only place in its Point I where it dignifies the statute by anything resembling an argument, it refers to our "final contention" (which actually is our fundamental contention and the first in order in our brief) that the Act requires a circuit court of appeals to proceed to a decree affirming, modifying or setting aside the Board's order once its jurisdiction attaches; and it then says (Ans. Br. p. 32):

> "The Act, of course, does not so state. Section 10(e) says only that a court 'shall have power' to enter a decree, not that it *must* do so."

With this cryptic remarks the argument on the statutory language is dropped, and the *reductio ad absurdum* referred to is taken up. Nowhere is it made clear what considerations are to govern the exercise of the court's power, which the Board thinks is not mandatory. Apparently the test for the exercise or non-exercise of such power is the will of the Board. Though it invoke the court's power upon what this Court has described as a "plenary submission of the cause to the court" (see *In re N.L.R.B., supra*), it may stop the operation at any point merely by "withdrawing" its petition.

Such is the necessary implication of the Board's argument. If it means something less than that, its meaning

has not been made clear. It has proposed no test of when the court shall exercise its powers and when it shall abdicate them in favor of the Board. It has gone no further than to suggest that the Congress has committed to the courts powers of a wholly discretionary character, laying down no standards to determine when the judicial discretion shall be exercised.

Such is not a normal and natural meaning of the words used in a statute which provides for a judicial review of an administrative proceeding. No other statute providing for such review has ever been so construed. No other administrative body has ever asserted the right to divest the court's jurisdiction at will, or even the right to ask the court voluntarily to divest itself of jurisdiction without deciding anything, in order that further administrative proceedings may be taken.

As we have pointed out in our brief, words used to define the functions of a public authority, though permissive in form, are uniformly construed as mandatory (cases cited, Br. p. 21). "Shall have power" means shall have power and shall exercise the same whenever its jurisdiction is properly invoked. There is no other reasonable meaning.

Underlying the Board's whole argument is an effort to misstate our position. We do not suggest that no case may ever arise in which a dismissal of the Board's petition would be appropriate. If on a petition by the Board the respondent pleaded that the Board had failed to comply with the Act by serving the order upon respondent before filing its petition to enforce, we suppose that the court might permit the Board to dismiss its petition without prejudice to a renewal thereof after the order had been duly served. Or if a respondent established that

it had already fully complied with the terms of an order of the Board having no prospective operation, we suppose that the court might dismiss the petition because of the absence of a proper subject of judicial power (Const. Art. III, Sect. 2, cl. 1).

But where the Board files a petition and the respondent by answer sets up defenses which go to the validity of the order, and some of which go to the validity of the entire proceeding, we can conceive of no principle which would permit the Board to revive its jurisdiction over the case at will; to appropriate the court's function of passing upon the respondent's defenses; to exercise the court's function of determining whether and what additional testimony shall be taken, and the court's statutory duty to set aside the order if it is invalid. As we said in our brief, the Board is asserting a right to halt the process of judicial review whenever it is pleased to do so.

The Board's second attempt to meet our statutory argument suggests that it "leads to the absurd conclusion that the court *must* proceed to a conclusion in a case even though *neither* party so desired." It is then pointed out that joint petitions to dismiss petitions for enforcement under the analogous Federal Trade Commission Act have been allowed, and it is said (Ans. Br. p. 33):

> "The concept of a judicial juggernaut which, once started, cannot be stopped by either party or by both together is so contrary to all reason that it would certainly require the clearest language to justify such result."

It seems hardly necessary to suggest that this argument is ridiculous. The wheels of the judicial machinery are

not self-starting, nor are they self-continuing; and if neither party wants a case to proceed, it cannot proceed. Moreover, if both parties ask that the petition be dismissed the court must dismiss it, since there has ceased to be a case or controversy which is the subject of judicial power.

It will be seen that the Board's statutory argument leads nowhere, and gives no reason why the Act should not be construed to mean what on its face it seems to mean. Section 10(e) and (f) provide that, whichever party invokes its jurisdiction, the court shall proceed to an affirmative decree in favor of the successful party, whether it be the petitioner or the respondent. Once the court's jurisdiction has attached, the statute gives one party no more power to control the proceedings than it gives to the other party. Their rights are strictly mutual. Whichever one prevails is entitled to an affirmative decree in its favor.

In this connection, we wonder whether the Board would contend that the rule works both ways; that if a "person aggrieved" sues to set aside the Board's order, and the Board spends several months in litigation before the court, the petitioner in such a case would have an "absolute right" to dismiss its petition without prejudice, thereby allowing it to commence an entirely new proceeding in another circuit court of appeals, or requiring the Board to commence an entirely new proceeding to enforce its order. Perhaps this question may be answered at the oral argument.

The Board's "statutory argument" in No. 183

In No. 183 the Board seeks to establish an "inherent" power to remand the case, apart from and above the provisions of the Act. So far as the Act is concerned, it contents itself with another effort to distort our argument into a proposition which is wholly untenable, and therefore easily answered.

Our position is that the mandatory language of the Act requires a determination of the case, and precludes a "remand" which is the equivalent of a dismissal of the petitioner's case on motion of the opposite party, without a statement of any grounds which would justify such a dismissal, and without any exercise of the function assigned to the court by the Act. We say that such a "remand" is not a remand at all, but is an abdication of the court's jurisdiction in favor of the Board.

The Board re-edits our argument past recognition (Ans. Br. p. 44), claiming that we contend, first:

> "that there is no power in a Circuit Court of Appeals to remand a cause to an administrative tribunal"

and second:

> "that if there be such a power, it does not exist in the present case, because it would be inconsistent with the provisions of Section 10 of the Act."

Thus the Board attempts to put us in the position of arguing that the statute makes this proceeding different from other proceedings to review administrative orders,

in that it precludes the exercises of a power which is normally exercised in all other cases.*

Our affirmative argument under the Act is thus turned into a negative argument, and an unsound one at that.

Of course, we have never asserted "that there is no power in a Circuit Court of Appeals to remand a cause to an administrative tribunal," and we could hardly make such an argument in view of the numerous cases, which are cited and fully discussed in our brief (50-57), wherein

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*The Board also pretends to misunderstand our argument that a remand before decision is a contradiction in terms and that normally a remand will occur only when an order has been set aside. The Board restates our argument as follows:

> "that even if the court below had the power to send the case back to the Board, the manner in which the power was exercised was improper. * * * that the Circuit Court of Appeals should have set aside the order of the Board before the remand." (Ans. Br. p. 50)

In other words, the Board is pleased to consider our argument as merely a procedural objection to the effect that the court, in remanding the case, did not take the technical step of setting the order aside.

Having set up this straw man, the Board proceeds to destroy it to its own satisfaction by saying:

> "It is plain that, at best, the argument relates simply to a question of procedural technique which could be decided either way without any practical consequences whatever. In essence, the argument is that the court should have set aside the order, rather than remanding it so that the Board could set it aside." (Ans. Br. p. 50)

If we had ever made this argument, or if the argument had any significance in the present case, the Board's comment thereon would lend itself to a very simple reply, namely, that the difference between having the court set aside the order and having the Board set aside the order is that the one procedure is provided for by the statute and the other is not.

However, since we have not made the argument; since it has no significance in the present case, and since we are concerned with "practical consequences" and not "procedural technique", it seems unnecessary to deal further with the Board's annihilation of this straw man (Ans. Br. pp. 50-51, Point III-B-1).

courts have "remanded" cases to administrative bodies or recognized that such a "remand" might be made in a proper case. We have some difficulty in seeing why the Board requires five pages, and the citation of 13 decisions, in order to refute a proposition which is ridiculous on its face (Ans. Br. pp. 45-49).

Nor have we ever suggested that a power to remand, otherwise existing under established judicial practice in administrative cases, is excluded or even limited by the provisions of the Act. The Board attributes such a contention to us (Ans. Br. 44, 47-48), after which it examines the statute, finds in it no evidence of an intention to exclude such an "inherent power" which would otherwise exist, and concludes (this being the sole argument which it addresses to the statute) that the "inherent power" exists in spite of the statute. In this part of its brief the Board is shadow-boxing with an imaginary adversary, and is not addressing itself to any contention which we have made.

The Board says that in Federal Trade Commission and Interstate Commerce Commission cases the courts have exercised an "inherent" power to remand the proceedings to those administrative bodies. We do not know what is meant by an "inherent" power, as distinguished from a power which is not "inherent"; but we have no doubt that whatever power of remand was found to exist in the cases cited arising under other statutes might likewise be found to exist in cases arising under the Act.

The question is not whether situations may arise in which the courts are called upon to do something which can be described as a "remand" of the case—because it is perfectly clear from the authorities that such situations have frequently arisen—but whether a "remand" was proper in the situation presented in this case.

If the language of the Act can be construed to mean that it is discretionary with the court whether or not to review an order of the Board, and that therefore the court has full power to send the case back to the Board for further proceedings whenever it may see fit, with or without a decision of the issues, then doubtless a "remand" is a proper manner in which to exercise such discretion.

But if Sec. 10 of the Act must be construed—as all other statutes providing for judicial review have been construed—as imposing a duty upon the court to determine the issues raised and to decide the case, then a remand without such determination and decision is obviously improper.

Under such a statute, as this Court pointed out in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 278, the sole function of a remand is to recognize the propriety of further action by the administrative body; obviously, the only purpose of such a recognition is to avoid a plea of *res judicata* as a bar to further proceedings; and the only situation which calls for such a declaration of rights is one in which the decision is unfavorable to the administrative body—in other words, is a situation where (to use the terminology of the present statute) the decree of the court sets aside the administrative order in whole or in part.

The Board's vague conception of an "inherent power" to remand cases leads nowhere, because the acceptance of even its broadest assertions as to such a power would not justify the conclusion that the "inherent power" may be exercised by a court for the purpose of escaping its duty to hear and determine the case. Moreover, the unsoundness of the Board's whole analysis becomes apparent when it is remembered

(1) that the word "remand" means a sending of a case back with directions to the lower court—directions which, incidentally, are enforcible by mandamus, *In re Sanford Fork & Tool Company,* 160 U. S. 427; *Gaines* v. *Rugg,* 148 U. S. 228; *United States* v. *Fossatt,* 21 How. 445;

(2) that at common law an appellate court had no power to remand, but only to affirm or reverse, *In re Frederich, Petitioner,* 149 U. S. 70, 74;

(3) that the power of the federal appellate courts to remand cases has never been recognized as "inherent" but has been the subject of specific statutory provisions since the Judiciary Act of 1789, *Ballew* v. *United States,* 160 U. S. 187, 197 *et seq.;* and

(4) that under the statute governing the federal courts (U.S.C. Tit. 28, §877) the power to remand exists only when a case "shall be reviewed and determined" by the appellate court.

Since the federal appellate courts have no power to remand cases to the lower courts until such cases have been "reviewed and determined," it would be surprising to find that they have such power in respect of administrative tribunals.

The vagueness and confusion in the Board's arguments are due simply to its refusal to recognize the distinction pointed out by this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co., supra,* wherein it was made clear that the word "remand" has at least two entirely different meanings;* that in one sense it de-

* While the Board pays its compliments to the *Nelson Bros.* case, it regards the whole subject as nothing more than a "quibble" (Ans. Br. 47).

scribes the exercise by an appellate court of its statutory function to give mandatory directions to an inferior court, while in another entirely different sense it describes the limitation which a reviewing court puts upon its own decree when it reverses an administrative decision on a ground which does not fully dispose of the controversy but leaves room for further administrative action in the same or a subsequent proceeding.

It is not difficult to explain why the Board is unwilling to recognize this distinction, since a recognition of it makes clear the purpose and function of a "remand" in cases of administrative reviews. And when that purpose and function are understood, all the general propositions asserted by the Board become untenable, and the case is left standing as one which must be decided according to the meaning of the statutory words.

As we have pointed out, the only normal and natural reading of the Congressional intent, as embodied in the words of the statute, excludes an abdication of jurisdiction by the court in favor of the Board, by a remand which is nothing more than a dismissal of the petitioner's case because the opposite party does not care to litigate the issues on the present record.

Point II—Failure of the Board's Proposed Procedure to Meet the Issues

The Board's brief is also remarkable for its total failure to argue one of the principal points of the case, namely, that the action proposed to be taken by it will eliminate only one of petitioner's objections to the validity of the Board's order (Br. 69-74).

The Board perhaps intends to meet this argument by its constant assertion throughout its brief that it is now

affording to petitioner the very opportunity which it complains was denied to it, *i.e.*, the opportunity to except and argue to an intermediate report. This is a complete misstatement of petitioner's position. Petitioner is not now seeking an opportunity to except and to argue before the Board to an intermediate report. It is seeking in the court a decree setting aside the order of the Board, with prejudice to further proceedings before the Board. The failure of the Board heretofore to afford petitioner an opportunity to except and argue to an intermediate report is only one of the grounds upon which petitioner's prayer for relief is based.

Even if the only basis for petitioner's contention were the failure to serve an intermediate report, and the Board confessed that this was error, or that it did not care to litigate the point, it would be the duty of the court to set aside the order. Petitioner's allegations would have been met by a plea of *nolle contendere*; the right of petitioner to the relief prayed for would be conceded, and the duty of the court under the statute would be plain. Since it would not be called upon to enforce the order, or to modify it, and since the case would have proceeded to the point where a decision was required, it would have no choice but to set it aside.

In such a situation the court would not be dealing with a moot question, as the Board suggests, any more than it would be dealing with a moot question in a case where judgment must go for the plaintiff or appellant because the defendant or respondent has defaulted, or has pleaded insufficient defenses, or expressly or by necessary implication has confessed error.

Where an order of an administrative body is set aside, the action of the court may or may not be without preju-

dice, depending on the circumstances. The full power of the court is to set aside the order without qualification; and if it does so, that is the end of the proceeding. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291.

Whether it is appropriate for the court to decree that its action in setting aside the order shall be without prejudice to further proceedings generally, or without prejudice to further proceedings of a particular sort, depends upon whether the court determines, after reviewing the case and deciding upon the objections of the aggrieved person, that the full discharge of its statutory duty does not finally dispose of the controversy, but leaves room for further action by the administrative body. The court's determination upon this matter depends upon what it finds to be the legal effect of such of the aggrieved party's objections as it finds to be valid.

The Board seeks to obliterate these distinctions by another resort to sweeping generalizations from particular cases, saying (Ans. Br. p. 22)* that if the court below had decided the case in favor of petitioner on its procedural objections,

> "Probably the court would have reversed the order without prejudice to a new order. It might well have directed that the case stand for further hearing before the Board. But even if the court merely set aside the order, its action would not necessarily bar further proceedings before the Board or be *res judicata* of another order by the Board. Thus the whole basis upon which the formal argument of petitioner is based falls to the ground."

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* We have omitted the citations which follow the respective sentences of this quotation.

It would seem from this summary that the Board's conception of administrative proceedings is that they are never finally disposed of except in favor of the administrative body; that otherwise, like the babbling brook, they go on forever.

The Board's summary implicitly recognizes, however, that in some cases the court's action will permit a new hearing, while in others it will permit only a new proceeding; and that in some cases the court's action in setting aside the order will be *res judicata* of an order in another proceeding, while in others it may "not necessarily" be *res judicata*.

The Board's conclusion, therefore, does not follow from its premises, and the correct conclusion to be drawn from the cases which it cites is that the court must determine in each particular case whether, and to what extent, further proceedings will be permissible under its decision.

Thus, in most of the Interstate Commerce Commission cases which the Board cites,* the invalidity of a rate order was due to the Commission's failure to consider relevant facts and circumstances; and the decision in each case provided for a remand of the case or its equivalent, in order that the Commission might re-determine the matter after considering such facts and circumstances, upon the evidence taken and such additional evidence as might be appropriate. The court's decision did not decree that the rates fixed were improper or that the rates enjoined

* *Atchison T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, 676; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 29; *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 33; *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302; *Florida* v. *United States*, 282 U. S. 1 and the previous decisions of the same litigation.

were lawful, and further proceedings were, therefore, entirely in order. Where, however, more was required of the administrative body than merely a reopening of the same proceeding, the court so specified, *e.g.* in *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 33, when the case was remanded so that the Commission might "make an original investigation" of the questions involved.

The cases which the Board cites, involving other rate fixing administrative bodies, are not relevant.*

The Federal Trade Commission cases do not support the Board's argument but hold in fact to the contrary. *Federal Trade Commission* v. *Mid West Mills*, 90 F. (2d) 723, was substantially identical on both the facts and holding with *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, cited and discussed in our brief, pp. 51, 55.

In *James S. Kirk & Co.* v. *Federal Trade Commission*, 59 F. (2d) 179, the court set aside the entire order of the Commission. As to one part of it, involving the use of the word "Castile" to designate soaps, the setting aside of the order was final and the controversy was at an end. As to the other part of the order, having to do with the words "olive oil," the court held that the issue was not within the pleadings and had not been litigated, and specified that the order was without prejudice to further proceedings with respect to that issue.

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* *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 423, contains a dictum to the effect that where the notice of the administrative hearings was inadequate, the duty of the court was to set aside the order "without inquiring into the merits, as having been made without notice of hearing" and not to appoint a master for the taking of more testimony. Obviously, the taking of additional testimony could not cure the defect referred to in this dictum.

It is quite true that if, on review of an administrative order, it is determined that the order is invalid because respondent has not been accorded a full and fair hearing, there may be no occasion for the court to consider the "merits." * *Morgan* v. *United States,* 298 U. S. 468; 304 U. S. 1. However, the fact that a court may decline to consider the "merits"—at least in rate cases—when it has found the hearing inadequate, affords no ground for limiting its inquiry into the validity of the hearing to only certain aspects thereof, leaving undetermined issues raised as to the validity of the hearing in other aspects. To do so is clearly to deny the aggrieved person his right to judicial review, by refusing him a determination as to the extent to which his defenses preclude or restrict the further action of the administrative body.

To put the case more concretely, to determine an issue which goes only to the validity of the particular order made, and to refuse to determine an issue which may affect the validity of the entire hearing or the entire proceeding and therefore vitiate any order based on such hearing or proceeding, so restricts the scope of judicial review as to deprive the aggrieved party of his right under the Act to have the administrative order "set aside" and the proceeding brought to an end if his defenses justify it.

All that the Board's cases stand for, and all that the Board contends that they stand for (Ans. Br. p. 21-22) is that the court below might, after deciding the case, permit

* Of course, in considering both the procedural questions and the "merits," a court's inquiry is confined to whether the action of the administrative body conforms with law. Even when reviewing findings with a view to determining whether they are supported by substantial evidence, the court does not consider the "merits" anew.

the Board to take further action in the present proceeding, or in some new proceeding as to which the court's decision would not be *res judicata*. This is quite true; it *might* sanction further administrative action. *Non constat* that it would permit such further action to be taken by means of an interim report based on the hearing already had, or that it would allow further action in the present proceeding, as distinguished from a new proceeding.

The Board attempts to meet this difficulty by arguing (Ans. Br. 20):

> "Obviously, petitioner can claim that the further proceedings before the Board will be prejudicial only upon the assumption that they will be invalid, or that, if the case were to be decided in the court below, it would be ended entirely—that the court would find petitioner's procedural and other objections meritorious and would leave the Board no alternative except a completely new proceeding from start to finish. We submit that neither assumption may be made."

The arguments which the Board addresses to the first of these "assumptions" are irrelevant (Ans. Br. 21), because our point is not that the Board will act improperly, or will not try to discharge its duties conscientiously. Our point is that, if we now have an objection which goes to the validity of the entire proceeding or the validity of the hearing, any action which the Board takes in the way of an interim report and making of a new order on the present record will be futile and hence invalid, because no such order will ever be enforcible.

It may be pointed out here, in passing, that in making these arguments we do not concede that any prejudice from the Board's proposed action need be shown, because

the action is not provided for by the statute and is improper whether or not prejudice can be found.

It may also be pointed out that the Board makes no answer to our contentions when it argues that, when the interim report is served, we can make any and all objections which we have to the Board's procedure. We are not interested in having the Board sit in judgment on its own procedure but are asking for, and are entitled to have, a judicial review of the Board's action and, if our defenses justify it, a setting aside of its order and such a limitation upon further administrative action as the justice of the case may require.

The second "assumption" which the Board thinks improper is in two parts. The second part is that a decision on one or more of our objections "would leave the Board no alternative" except a new proceeding or (which the Board does not say but which is equally relevant) a new hearing.

Our position is that we do not have to make that assumption, because the orders below would be improper if a favorable decision on one or more of our objections *might* require a new proceeding or a new hearing; that at the present time it is not necessary to decide whether, as a matter of law, such a decision would necessarily have that effect; that the recommittal of the proceeding to the Board cannot be justified until either (1) these objections have been determined, and determined unfavorably to petitioner, or (2) it has been determined that these objections do not go to the validity of the proceeding or the hearing held therein.

But even if it were necessary to make such an assumption, it seems to us that it is the only one that is permissible. To take one example of our objections, we have raised issues with respect to the conduct of the trial

examiner (R. 11-12, 66-67, 82-83; see main brief, pp. 69-71) which, if decided in our favor, clearly would invalidate any further proceedings based on the record already made.* *Cf. Fitchburg Steam Engine Co.* v. *Potter,* 211 Ill. 138, cited and quoted from at p. 66 of our main brief. To the same effect see the cases cited in the footnote below.†

To take another example, we have alleged that there is no evidence to support material and necessary findings which the Board has made or must make in order to support an order upon the charges made in the complaint (R. 11, 66); and under the authority of *Federal Trade Commission* v. *Curtis Publishing Co. supra,* a decision in our favor upon such allegation would require the setting aside of the order without any remand for further administrative action.

Upon the point under discussion, *Federal Trade Commission* v. *Curtis Publishing Co., supra,* seems conclusive, though for some inexplicable reason the Board cites it in support of its argument (Ans. Br. p. 45).

In that case the Publishing Company contended that the Commission's order was not supported by the findings

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* We have also raised issues respecting the conduct of the Board (R. 12-17, 67-72, 82-83, 106-107) which are discussed in our main brief, pp. 71-72, and which, we would contend, go to the validity of the entire proceeding.

† (a) The following cases involve referees and masters in chancery: *McCormick* v. *Walker,* 142 N. Y. Supp. 759; *Stebbins* v. *Brown,* 60 Barb. 272 (N. Y.); *Dorlon* v. *Lewis,* 9 How. Prac. 1, (N. Y.).

(b) The following cases involve judges of inferior courts: *Morris* v. *U. S.,* 26 F. (2d) 444; *People* v. *Gilbert,* 256 N. Y. S. 442; *Reeves* v. *State,* 267 S. W. 666; *Cf. Berger* v. *U. S.,* 255 U. S. 22.

(c) The following cases involve administrative bodies exercising judicial or quasi-judicial functions: *State ex rel Barnard* v. *Board of Education,* 19 Wash. 8, 52 Pac. 317; *State ex rel Getchell* v. *Bradish,* 70 N. W. 172 (Wisc., 1897); *Stockwell* v. *The Township of White Lake,* 2 Mich. 341; *State* v. *Crane,* 36 N. J. L. 394; *Cf. Tumey* v. *Ohio,* 273 U. S. 510; *Ex Parte Robinson,* 28 T. L. R. 288.

and that findings necessary to sustain the order would not be supported by the evidence. The circuit court of appeals having found that the order was not supported by the findings, the Commission asked this Court to remand the case to it for the purpose of making the findings which were lacking. This Court, however, held that such a remand might not be made until it had first decided that the necessary findings would be supported by the evidence. Therefore the Court examined the record, and having decided that such findings, if made, would not be supported by the evidence, it refused to remand the case and instead set aside the Commission's order.

The *Curtis* case is conclusive of the issue in both No. 182 and No. 183, not only because the general principle which it applies is applicable to the various defenses which the petitioner has asked the court to determine, but also because, as pointed out above, the specific defense relied on in the *Curtis* case has been set up in the petitioner's answer (R. 11, par. 11) and its own petition (R. 66, par. 12).

We come now to the other part of the second "assumption," to which the Board has objected, namely, the assumption that, if the court below should decide the case it "would find petitioner's procedural and other objections meritorious."

It must be apparent that this assumption is not only permissible but is necessary, because the proceeding in the court below had not yet reached the stage of a decision upon our objections,* and since the Board has not denied the allegations of either the answer in No. 182 or the petition in No. 183.

* See cases cited (Br. 29-36; Ans. Br. 26-27) involving applications for voluntary dismissals where the defendant has asked for affirmative relief. Under the general principles stated above, it is assumed that the defendant's cause of action for affirmative relief is meritorious.

It results from the foregoing that the Board's argument (Ans. Br. 20-23) virtually concedes our case. It admits that if we advance defenses which would be conclusive of the present proceeding or of any order based on the hearing already had, we would have a meritorious objection to the Board's motion to dismiss its petition and, on the same theory, to its motion to remand in No. 183. Since it is clear that we have raised such defenses; since several of them would clearly be conclusive of the present proceeding and any order which might be made upon the hearing had therein, and since their meritorious character must be assumed, the order below must be reversed even on the Board's own theories.

Point III—The Right to Voluntary Dismissal

We have already dealt with that part of Point I of the Board's argument which relates to the provisions of the Act. There remains the argument by which it seeks to escape the language of the Act, namely, the general principles which it regards as applicable to voluntary dismissals. According to the Board's view (Ans. Br. pp. 18-31) they are as follows:

> 1. That a petitioner in an administrative proceeding, like a plaintiff in any civil case, has an absolute right to a dismissal without prejudice at any time before judgment, and the court has no discretion to deny such dismissal, unless the petitioner
>
> (a) has asked for affirmative relief; and in addition,
>
> (b) can show some substantial prejudice arising from the denial to him of an opportunity to seek such affirmative relief in the pending proceeding.

2. That the relief which the petitioner has asked for in No. 182 is not "affirmative relief."

3. That even if the relief asked by petitioner is affirmative relief, it cannot successfully oppose a dismissal without prejudice because it cannot show that the denial of affirmative relief would cause it any substantial prejudice.

4. That even if petitioner can show both (a) that it is entitled to affirmative relief and (b) that it would be substantially prejudiced by the denial thereof, it would still be discretionary in the court to grant a dismissal without prejudice, and the court below correctly exercised such discretion pursuant to a "policy of avoiding needless litigation which was invoked by the Board in support of its motion."

Not one of these four propositions is supported by the authorities cited, or by any other authorities, even as applied to plaintiffs in ordinary civil litigation.

Nor is there even a logical basis—much less the authority of decided cases—to apply such principles to the kind of a dismissal which was sought by the Board below. We have pointed out (Br. 28) that the reason for the rule permitting voluntary dismissals in certain circumstances does not apply when an administrative tribunal seeks a dismissal of the petition for enforcement in order to take further proceedings before itself.

The Board either misunderstands our argument or pretends to do so, because the argument with which it answers the point is non-responsive (Ans. Br. 19). Our argument is not that such a dismissal should not be allowed *because* further proceedings before an administrative body will follow, but that such a dismissal is not a dismissal of the "proceedings" at all, that it is nothing more

than a transfer of jurisdiction from the court to the Board. The authorities which the Board cites (but incorrectly interprets) would fully support its position if it were seeking to dismiss for the purpose of setting aside its order, dismissing its own complaint, and ending the present *proceeding*. They have no application at all to the situation actually presented in this case, when it does not propose to end the proceeding but only to recapture control over it.

Jones v. *Securities and Exchange Commission*, 298 U. S 1, which the Board cites in its argument but which in no way supports it, is an illustration of what a real dismissal would be. There the party who had invoked the jurisdiction of the Commission desired to withdraw his application and terminate the whole proceeding; and the discussion in the opinion is addressed to that situation. The case would be relevant only if the Board's motion below were a prelude to the dismissal of its own complaint.

In any event, the Board's argument is based upon an analysis of the law which the cases do not support and which, in fact, they refute.

Alleged dual requirement of "affirmative relief" plus "prejudice"

The dual requirement of the Board's proposition No. 1, namely, that in order to prevent a voluntary dismissal a defendant must both (a) have asked for affirmative relief and (b) be able to show substantial prejudice resulting from the denial thereof, has no basis except in the Board's interpretation of this Court's language in *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, 93-94, which we have quoted in our brief (p. 29) and which we repeat:

> "The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief *and* he would be prejudiced by being remitted to a separate action."

The Board interprets the italicized * "and" as imposing two requirements—affirmative relief plus additional special prejudice.

There is no need to argue what will readily occur to the Court—that this is not the natural meaning of the words used, especially when the quotation is read in its context. For all that the dictum in the *Skinner* case purports to be is a summary of the earlier authorities, and a succinct statement of the law as more fully expounded by the same justice (Taft, *C. J.*) at circuit in the earlier case of *City of Detroit* v. *Detroit Street Railway Co.*, 55 Fed. 569, where he quoted and applied the following statement of the rule (at p. 573):

> "* * * if he [defendant] seeks or has become entitled to affirmative relief, *so that* it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill." (Italics ours.)

In other words, the dictum in the *Skinner* case means what it seems to mean, and does not mean what the Board attempts to make it mean. Obviously, the reason for the additional clause is that the rule only applies to a case where the dismissal of the plaintiff's bill will carry with it the defendant's cross bill. It is not only necessary that the defendant ask for affirmative relief, but that the

* Italics ours.

dismissal of the plaintiff's complaint will prevent him from getting affirmative relief; and where the defendant may proceed on his cross bill in spite of plaintiff's dismissal, the dismissal is, of course, allowed. *Harding* v. *Corn Products Refining Co.*, 168 Fed. 658, cert. den. 214 U. S. 515.

The statement of Taft, J., in the *City of Detroit* case is supported by every case cited by the Board in its brief for its contrary proposition, and its contrary proposition is not supported by a single one of these cases.*

It is not necessary to rely, however, on any general statement of the law in either of the cases cited, because we are content to rely on the numerous authorities which expound the rule, the plain fact being that in *all the cases* cited by the Board in which defendant sought affirmative relief the court refused to permit dismissal by the plaintiff and that *not one case* granted such dismissal on the ground that special prejudice in addition to a loss of affirmative relief had not been shown.†

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* The best that the Board can do with these authorities is to take a case like the *City of Detroit* case, and because there was present a special prejudice which would result from the dismissal of the complaint, argue that such prejudice was the determinative fact.

The argument is without substance, first, because the same result has been reached in every similar case without a showing of special prejudice and, second, because the opinion in the *City of Detroit* case clearly shows that the case was decided on the ground of defendant's right to affirmative relief, and that the special prejudice was an additional fact, introduced in the opinion by the word "Moreover" after the court had already held in its opinion that the plaintiff could not dismiss. (See 55 Fed. at 575.)

† In fact, not one case granted a dismissal, where defendant had sought affirmative relief, on *any* ground. *Ætna Life Ins. Co.* v. *Wilson*, 84 F. (2d) 330, cited by the Board, permitted dismissal though the defendant had prayed for what we would consider to be affirmative relief, *i.e.*, a declaratory judgment of the invalidity of the insurance policy sued on. The case is contrary to all the other similar cases cited (Br. pp. 31-36), but is distinguishable

The fact is, also, that there is not a single statement of the rule in any of the numerous cases cited by us and by the Board on this point—although almost every case contains a statement of the rule—which imposes a double requirement of affirmative relief plus special prejudice.

We are at a loss to see how the Board can seriously cite the four cases which it cites at page 27 of its brief in support of the proposition that "Unless there be actual prejudice, a prayer for affirmative relief is immaterial."

We discuss elsewhere two of the four cases cited—*City of Detroit* case * and *Ætna Life Ins. Co.* v. *Wilson,* 84 F. (2d) 330.†

The other cases which the Board cites not only do not support its propositions, but refute them. These cases are:

Harding v. *Corn Products Refining Co., supra.*
Whittel v. *Roche,* 88 F. (2d) 366.

Harding v. *Corn Products Refining Co.* turned *expressly* on the ground that the plaintiff had made his motion to dismiss without prejudice to a continuation of the suit on the defendant's cross bill. The case clearly recognizes that the presence of the cross bill would otherwise have defeated the plaintiff's motion.

Whittel v. *Roche* turned on the fact that the cross bill was filed after the motion to dismiss. The case clearly

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* *Supra,* pp. 25, 26, footnote, and *infra,* p. 28.
† *Supra,* p. 26, footnote.

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on the ground that the defendant in another action instituted by itself was seeking the same "affirmative relief."

Moreover, the court in the *Ætna* case did not place its decision on the ground that no special prejudice had been shown, but placed it on the ground that what defendant had asked for was *not in fact affirmative relief.* In this respect, also, the case is contrary to all the other authorities.

recognizes that a filing of the cross bill prior to the motion to dismiss would have defeated the latter.

The Board (Ans. Br. 25-26) attempts to distinguish the cases cited in our brief (pp. 31-36) by arguing (1) that in some of the cases the loss of his right to affirmative relief would have worked a hardship on the plaintiff, and (2) that in others (specifically the patent cases) the defendants were asking for "substantially more than that which they would have had by a successful defense in the plaintiffs' cases." *

The first distinction does not advance the argument for the fact is that the courts did not place their decisions upon the ground of special prejudice, but placed them squarely on the ground that the defendant had asked for and was entitled to have affirmative relief, and that the plaintiff could not defeat his right thereto by dismissing the complaint. It must be remembered, of course, that there are two separate and overlapping rules: (1) the general rule that the plaintiff may not dismiss his bill where the defendant would be substantially prejudiced, and (2) the specific rule that the plaintiff may not dismiss his bill where the defendant has sought affirmative relief. In some of the cases, such as the *City of Detroit* case,† the court invoked both rules, but there is nothing in any of these cases to suggest that both grounds were required for the decision. In fact, the cases clearly show the contrary.

The Board's first distinction is unsubstantial for another reason. All it means is that the Board has examined the cases and has found that each defendant had important

* The Board does not purport to deal with all of our cases, but cites only some of them.

† See discussion, *supra*, p. 26, footnote.

rights involved in the cross-bill, or that there were good reasons why it wanted to go on and have its case decided. There is nothing surprising about that, since a defendant ordinarily does not file a cross-bill unless it has something to litigate and wants its case decided. If this Court decides the present case in our favor, some later brief-writer may attempt to distinguish this case on the ground that the loss of the petitioner's right to affirmative relief would have worked a hardship upon it—as it most certainly would.

The Board's first distinction is simply an attempt to make the cases turn on an issue other than that upon which they were decided, in order that the Board may escape their effect.

The Board's second distinction, with respect to the patent cases, is no more substantial. It is not suggested in what respect the defendants in those cases were asking for "substantially more" than they would have obtained by a favorable adjudication of the plaintiffs' claims on the merits. The plain fact is that in the typical case the plaintiff was suing for infringement of a patent and the defendant was asking for an adjudication of invalidity or non-infringement, or both—precisely the adjudication which it would have obtained if judgment on the plaintiff's complaint were entered in its favor.

Relief "not affirmative"

The Board's second proposition is that the petitioner in No. 182 is not entitled to "affirmative relief," and this argument has been fully dealt with in our brief (pp. 32, *et seq.*). However, there is a new twist to the argument which perhaps deserves mention. It seems to be something like this (Ans. Br. 24-25):

1. The relief to which petitioner is entitled under the Act is something which it can get without filing an answer and without specifically asking for such relief.

2. Hence neither the powers of the court nor the rights of the petitioner were enlarged by the prayer for relief.

3. Hence the petitioner is in the position of a defendant in an ordinary lawsuit who has filed a motion to dismiss or asked for a dismissal in its answer but has not asked any relief running in its own favor.

4. In other words, the petitioner is asking no more than a judgment in its favor on the Board's petition.

5. Ergo it is not asking for affirmative relief.

It may be that the court will be able to follow the march of this argument from premise to premise and to the triumphant conclusion which the Board describes as an "almost self-evident proposition" (Ans. Br. 25). We are unable to follow it, however; for all we can see that it means is that relief is not affirmative unless the defendant has to ask for it, and hence it is not affirmative here because the Act provides it without any asking—a proposition which is absurd on its face.

The Board's third proposition—that petitioner cannot oppose a dismissal without prejudice because it cannot show both the right to affirmative relief and prejudice resulting from a denial thereof—is a conclusion derived from its first proposition, and has already been dealt with.

Dismissal a matter of discretion

Before discussing the Board's fourth proposition, we point out that we are not quite clear that the Board seriously advances it, although such seems to be the tenor of its argument from pages 29-31, and we can derive no other meaning from paragraph 3 on page 29. We therefore address ourselves to the argument on the fourth proposition as we have stated it.

This proposition assumes that petitioner can satisfy both the requirement of affirmative relief and the additional requirement of special prejudice, but asserts that the Board is nevertheless entitled to its dismissal because (1) the court had discretion to allow it and (2) it exercised that discretion properly, in pursuit of the Board's "policy of avoiding needless litigation" (Ans. Br. p. 31).

Here there is a shift in the argument. Up to this point the dismissal has been sought and defended as an "absolute" right (Ans. Br. 16). Now it becomes a matter of judicial discretion.

And here we find an interesting example of the Board's conception of the relative rights of the petitioner and the respondent. The Board did not invoke the court's discretion below; the court did not purport to exercise its discretion, and the only reference in the record to the question of discretion is an argument by petitioner below that, even if the motion could be regarded as addressed to the court's discretion (which petitioner claimed it could not, and which the Board did not claim it was, R. 36-38), it would have to be denied (R. 45-46).

Nevertheless the Board now argues that the action below was an exercise of discretion; and it further contends that the petitioner may not counter with a claim that it was an abuse of discretion, because petitioner did not

make that claim in its petition for *certiorari* (Ans. Br. p. 30).

In other words, the Board may raise a new point in this Court, and must prevail upon it—not because it is a sound or proper point—but because the petitioner is estopped to answer it.

While we know of no principle of decision which would permit such an absurd result, the grounds upon which petitioner sought and obtained *certiorari* in this case are quite comprehensive enough to be a basis of attack on the order, whether regarded as discretionary or as a matter of "absolute" right (Pet. for Cert. pp. 3-11). On the other hand, it seems very doubtful to us that the Board can now defend as an exercise of discretion what it did not seek as a matter of discretion, and what the court did not purport to grant upon an exercise of discretion.

However this may be, the Board's fourth proposition, as we understand it, is that the court had discretion, and properly exercised such discretion, to allow the Board to withdraw its petition in spite of the fact that petitioner (a) was entitled to affirmative relief and (b) would be substantially prejudiced by the denial thereof resulting from such dismissal. Neither this proposition—nor the more limited propositions that the court would have discretion to allow the dismissal if *either* of the two elements of affirmative relief and special prejudice were present, but without the other—finds the slightest support in any of the authorities.

The Board has cited six cases to sustain its fourth proposition and four cases to sustain the proposition that "Similar power exists to permit appellants, including the United States, to discontinue an appeal over the objection of the appellee." (Ans. Br. 29.)

Of the six direct citations, three involved no question of affirmative relief. *Penn Phonograph Co.* v. *Columbia Phonograph Co.*, 132 Fed. 808, does no more than quote the language from the *Pullman's* case which we quote below. Neither the *Penn Phonograph* case nor *Pilot Life Ins. Co.* v. *Habis*, 90 F. (2d) 842, contains any language to indicate that there is discretion to permit dismissal if defendant will be prejudiced. *United Motor Service* v. *Tropic-Aire*, 57 F. (2d) 479, is clearly in accordance with all the authorities in stating that *;

> "There are well-established just exceptions to this rule, to-wit, *where defendant asks on the pleadings affirmative relief* or where he has acquired in the proceedings some substantial right or advantage that he would lose by virtue of the dismissal." (p. 481.)

Neither these three cases, nor the other three to which we next refer—where some question of affirmative relief was involved—furnish a vestige of authority for the Board's proposition. In two of the latter cases, *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, and *Dooley Improvement's, Inc.* v. *Motor Improvement's, Inc.*, 6 F. Supp. 161, it was held that the filing by defendant of a pleading seeking affirmative relief re-

* The court said that "No affirmative relief was asked" (p. 480) and after reviewing the authorities, stated the rule as follows (p. 482):

> "If it is inequitable to permit the dismissal of an equity case it should not be done. Whether it is inequitable is to be determined by the trial court in the exercise of a sound discretion."

In other words, the trial court was to exercise a sound discretion in determining whether it would be inequitable, i.e., prejudicial, to the defendant to allow plaintiff to dismiss. There is no showing that, prejudice having been shown, the court still had discretion to permit such dismissal.

moved the plaintiff's right of dismissal even though filed *after* plaintiff's motion to dismiss.

In the *Pullman's* case this was an alternative ground of decision. In the *Dooley* case the court said:

> "If a defendant has acquired during the progress of a case a right to affirmative relief and embodies that right in a counterclaim, a court of equity is bound to consider such a counterclaim, whether filed before or after plaintiff files a motion to dismiss its bill of complaint. *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, * * * (p. 162).
>
> * * *
>
> "It is obvious that a denial of defendant's right to prove its counterclaim would of itself be prejudicial and an inequitable hardship to the defendant. Upon this ground alone the motion to dismiss should be denied."

Not only is the holding of the *Pullman's* case opposed to the Board's proposition for which the case is cited, but the language of the court at the dictum page referred to by the Board (p. 146) lends no support to the Board's proposition. Apparently the Board intends to call attention to the statement of the court that

> "Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here."

Clearly it is a fundamental rule that plaintiff may not dismiss in a case where defendant seeks affirmative relief, and that the court has no discretion in such a case. Moreover, the Court in support of the quoted statement

cited *Stevens* v. *The Railroads*, 4 Fed. 97, where the court refused to permit a voluntary dismissal of a suit to enforce a lien (although defendant had taken no step other than filing an answer), on the ground that, if successful, defendant would be entitled to "an adjudication that no such lien exists."

The third of the three cases cited by the Board which involved a question of affirmative relief, *City of Detroit* v. *Detroit City Ry. Co., supra*, has already been discussed.

The cases governing dismissals of appeals do not justify any detailed analysis. Two classes of such cases are dealt with at pages 58-64 of our brief, and the principles of the subject sufficiently appear from these cases. The cases cited at page 29 of the answering brief are not relevant. There is nothing to indicate that *United States* v. *Griffith*, 141 U. S. 212, was a dismissal without prejudice, and *Latham's & Deming's Appeal*, 9 Wall. 145, and *United States* v. *Belcher*, 294 U. S. 736, clearly were not, but were dismissals which concluded the particular cases.

United States v. *Young*, 94 U. S. 258 was a dismissal made necessary by the exercise of the anomolous power of the Court of Claims to grant a new trial in spite of a pending appeal, and *United States* v. *The Minnesota & N. W. R. Co.*, 18 How. 241, was a public land case where the court granted the dismissal on the Attorney General's assurance that he would not make any further attempts to try the issue in that case, but would institute a new action (as he could do because the railroad was charged with a continuous trespass on public lands).

It is apparent that none of these cases have any significance to the argument in which they are cited.

On the other hand a rule analogous to that prohibiting a voluntary dismissal when the respondent party is entitled

to affirmative relief is applicable to the appeal cases. The situation does not often arise, because normally there is a cross appeal in such a case and the appellant's dismissal would not affect the appeal of the opposite party. However, when a situation arises in which the appellant's dismissal would bar the appellee's rights, such a dismissal is denied. *The John Twohy*, 255 U. S. 77.

That was an admiralty case, in which the ship appealed from a decree partially unfavorable to it. The libellants, relying on the doctrine that an admiralty appeal brings up the case for hearing *de novo*, did not appeal from the part of the decree unfavorable to them. After their time for appeal had expired, the ship moved to dismiss its appeal and the circuit court of appeals granted the motion. This Court reversed, holding that no dismissal should be had because it would prejudice the libellants by foreclosing their right to a review of the unfavorable portions of the decree.

It is submitted that the law applicable to voluntary dismissals is clear; that the Board's attempt to distort it so as to support the orders below is unsuccessful; and that—even taking the Board's view as to the applicability of these principles to a case where it is not asking for dismissal in any real sense of the word but merely to have a transfer of jurisdiction to itself contrary to the Act—the action of the court below was clearly erroneous.

Point IV—Remand of Petitioner's Case

We have already dealt in Points I and II with the Board's principal contentions in support of the order of remand in No. 183. We will here refer only to such of the Board's contentions and authorities as have not been previously met.

The Board cites several Federal Trade Commission cases for the proposition—which petitioner does not deny and which does not help the Board's case—that courts have "recognized or exercised their power to remand actions to the Commission for further proceedings." (Ans. Br. p. 45).

In two of these cases, discussed in petitioner's brief (pp. 53-55), this Court set aside the order of the Commission and refused to remand on the very ground that a remand would be futile, the ground for the invalidity of the order being one which further action of the Commission could not cure.*

In those cases cited by the Board in support of this proposition in which a remand was actually made, the court had fully reviewed the order of the Commission and remanded the proceeding only to permit further action which could not be taken by the court,† because it was of an administrative rather than a judicial character. We do not contend that action similar to that taken in any of these cases would not be proper in a proceeding under the National Labor Relations Act.

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* *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291.

† *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, discussed in our brief, p. 55; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47, cert. den. 273 U. S. 717, in which the court determined that the Commission had properly found respondent guilty of an unfair practice, but that the order of the Commission was not a practical method of enforcing compliance with the Act, and vacated the order and sent the case back to the Commission for the purpose of determining what other form of order might be appropriate.

In *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, the court determined that the order of the Commission was invalid, vacated the order, and remanded the case only because the grounds of invalidity did not preclude further proceedings on the same subject matter.

In *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615 the court "affirmed" the order of the Commission, but, assuming itself without

Similarly, the Board asserts, as though it were important in the present case, that, "this power to remand has been exercised under the National Labor Relations Act itself." Here again the Board asserts a proposition to which petitioner takes no exception, and which fails to help the Board.

The cases cited by the Board * which have to do with those parts of the pertinent orders of the Board which related to the reinstatement of employees, illustrate a method which the courts have invented for dealing with this peculiar form of relief when the Board's order is too indefinite for immediate enforcement, but is predicated upon findings of unfair labor practices sustained by the court. In the first of these cases—the *Agwilines* case—the court "affirmed in principle" but remanded the case and directed the Board, if the matter were not settled by the interested parties, to make a definite finding and a new order on those issues, to make the same a part of the transcript, and to submit them to the court for review. In the meantime, the court's decision was, so to speak, held in suspense. The other two cases are similar.

The cases do not support the Board, because in each of them the court proceeded to a decision of all the issues which were in the power of the court to decide, and only remanded the case for such administrative action as was

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* *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. (2d) 146, 155 (C.C.A. 5th); *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509 (C.C.A. 5th); *Mooresville Cotton Mills* v. *National Labor Relations Board,* 97 F. (2d) 959, 964 (C.C.A. 4th).

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power to "enforce" without there first being a determination that the respondent had not complied with the order, "referred" to the Commission the question of a present violation, with directions to the Commission "to report its conclusions to this Court."

found to be necessary before a sufficiently specific order for reinstatement with back pay could be entered.

The Board's discussion of cases involving the granting by the appellate court of a request of a lower court for a return of the record * and of cases of remand without reversal † differs in no respect from the discussion of such cases in its brief in opposition to the petition for certiorari (pp. 16-17) and it does not even purport to answer petitioner's arguments addressed to such cases (Br. 58-64).

The Board cites 16 cases to show that situations sometimes arise in which an appellate court may remand a case to a lower court without deciding the merits—a proposition which petitioner does not dispute. The Board cites no case, however, in which an appellate court simply abdicated its jurisdiction and remanded the case without deciding anything, or in which, in fact, the court did not decide all the questions that were raised and which it could decide without exercising original jurisdiction and without encroaching upon the power of state courts to determine questions of state law.

This appears from the Board's own statement of the holdings of most of these cases. Thus, it cites four cases ‡ for the proposition that such a remand may be made

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* *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, reversed on other grounds, 274 U. S. 316; *Cimiotti Unhairing Co.* v. *American Unhairing Mach. Co.*, 99 Fed. 1003; *Sundh Electric Co.* v. *General Electric Co.*, 244 Fed. 163, cert. den. 245 U. S. 661; *Roemer* v. *Simon*, 91 U. S. 149; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547; and *Hall* v. *United States*, 78 F. (2d) 168.

† *Ballard* v. *Searls*, 130 U. S. 50; *Jensen* v. *New York Life Ins. Co.*, 50 F. (2d) 512, cert. den. 287 U. S. 626.

‡ *Estho* v. *Lear*, 7 Pet. 130; *Levy* v. *Arredondo*, 12 Pet. 218; *Villa* v. *Van Schaick*, 299 U. S. 152; *United States* v. *Rio Grande Dam and Irrigation Co.*, 184 U. S. 416.

where the "record was insufficient" or "the evidence inadequate," i.e., where the court reversed the judgment or decree below on the ground that it was not warranted by the record before it, but remanded the case for further proceedings to the court of original jurisdiction in order that additional evidence might be taken which was found to be necessary for a final disposition of the case.

The Board cites two cases * for the proposition that such a remand, without decision, may be made "where a wrong rule of law was applied below." The Board's very statement reveals that the court determined that a wrong rule of law was applied below, reversed the judgment because it was erroneous, and remanded for further proceedings in accordance with law.

A remand because the court below has failed to make proper findings of fact † merely recognizes that the functions of this Court are appellate and do not include the examination of bulky records and the making of findings of fact. *Patterson* v. *Alabama,* 294 U. S. 600, involved a remand in order that the state court might reconsider its determination of a question of state law, the question being one which this Court was powerless to review and yet which, in view of a supervening decision, was necessary to be reviewed in order that the interests of justice might be accomplished.

In all such cases the court "reviewed and determined" the case to the fullest extent that it was within its power to do on the record before it, reversed the judgment or

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* *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202.

† *Lincoln Gas & Electric Light Co.* v. *City of Lincoln,* 223 U. S. 349; *Interstate Circuit, Inc.* v. *United States,* 304 U. S. 55. Cf. *Malleable Iron Range Co.* v. *United States,* 273 U. S. 674, cited by the Board (Ans. Br, p. 53).

decree, and remanded the case only because the grounds for the reversal were not such as finally to determine the controversy. None of these cases supports the proposition which the Board apparently suggests that they establish—although it does not so state—namely, that a court whose jurisdiction has been properly invoked may, if it so pleases, abdicate its jurisdiction without deciding any of the questions which are raised upon the record before it and which are within its power to decide.

The Board apparently thinks that in such cases all that the court does is enter a "formal reversal" without deciding anything, and that even the "formal reversal" is made only to remove technical impediments which would otherwise exist to further action below, or to a further appeal after further action below. The cases cited by the Board in this connection * add nothing to the Board's argument. Most of them are cases in which the proceeding was remanded to the lower court in order that it might take into consideration events supervening since its prior decision and necessary to be considered in order that the ends of justice might be accomplished. Such cases are not at all analogous to the present situation, and in each of them the case was remanded, *at the instance of the appellant*, only after the court had determined that the supervening fact had obvious and direct effect upon the validity of the decree being reviewed, and that the supervening fact could not be given effect in the first instance by the appellate court but required further action by the lower court.†

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* *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 509; *Missouri* v. *Public Service Commission*, 273 U. S. 126, 131; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Villa* v. *Van Schaick*, 299 U. S. 152, 155, 156; *International Ladies' Garment Workers' Union* v. *Donnelley Garment Co.*, 304 U. S. 243, 251–52; *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, 903, reversed on other grounds, 274 U. S. 316.

† Cf. *Butler* v. *Eaton*, 141 U. S. 240.

Point V—Arguments of Public Policy

Arguments of public policy are made by both sides in this case (Br. 23-27, 43-46; Ans. Br. 33-35, 60).

The Board argues that its purpose in the case is a sound one; that it has changed its procedure since the *Morgan* decision and is willing to reconsider its order in the light of exceptions to an interim report, and that petitioner is taking an obstructionist's position by resisting the Board's proposed action.

As to this phase of the argument, however laudable the Board's purpose may be—or would be if the petitioner were not complaining of many errors besides the lack of an interim report, and which would not be cured by an interim report—the Act does not provide for its accomplishment; and it can accomplish its purpose only by reference to general principles and by a construction of the statute which will be of general application. Hence the case may not be considered without looking at the results which might follow in other cases and other situations which may arise in the future.

With this thought in mind, we pointed out in our brief the extent to which the Board's interpretation of the Act would limit or condition the scope of judicial review (Br. 23-25, 27) and the wide field of administrative power and discretion that would be open to the Board, in this or any other case, after it had divested the court of jurisdiction (Br. 25-26).

Referring to the latter subject, we pointed out in our brief (pp. 25-26) that if the Board gets this particular case back into its control, or any subsequent case where it procures a dismissal or "remand" for the purpose of additional proceedings, the correction of particular errors or the retrial of particular issues—assuming that it is right in

construing the statute so that in such a situation its powers under Sec. 10(b), (c) and (d) are revived—it may either let the case lapse for a time because of some supposed reason of policy; or amend its complaint to charge additional unfair labor practices, and either take more testimony or determine the amended issues on the existing record; or may consolidate the case with other cases against the petitioner, present or future; or may take additional evidence to support any of its charges, but refuse to permit the petitioner to take additional evidence on other issues; or may take any other steps, or combination of steps, which it might have taken before the case was brought to issue.

The Board does not answer the substance of this argument, but attempts to turn it aside with the suggestions that the Court "will not accept an argument which impugns the good faith of an administrative agency" (Ans. Br. 34); that we are attempting "to conjure up hypothetical abuses which might be committed by the Board," and that the Court will not "speculate" as to any further proceedings which the Board may take, "nor will it assume that they will be irregular in any respect" (Ans. Br. 35).

It is surprising that the Board so characterizes the hypothetical cases which we have put. Being an administrative as well as quasi-judicial body, the Board naturally, and doubtless quite properly, must be affected from time to time by considerations of policy and by factors of an economic, social or political character. We have not suggested that action taken on the basis of such considerations would be "irregular," and we could hardly do so because the action that we refer to would be expressly sanctioned by the Act, if construed as the Board interprets it. Nor

do we either impugn the good faith of the Board or suggest that it would be guilty of intentional "abuses."

There is room for a difference of opinion as to what constitutes an "abuse." We are inclined to agree with the Board, however, that from the standpoint of good government, resort to any of the possibilities mentioned—after the case had once been submitted to the court and the issues therein made—would very likely be an "abuse" of administrative procedure, tending to break down the safeguards of quasi-judicial action, resulting in a confusion of the prosecuting and judicial functions, and tending to prevent the prompt, effective and even-handed justice which is the administrative ideal.

Therefore we say that the Act should not be construed so as to make such abuses possible. Yet under the Board's interpretation they would not only be possible, but they would be sanctioned by express grants of statutory authority set forth in plain language in Section 10(b), (c) and (d) of the Act and by the Rules and Regulations of the Board.*

Our argument is further strengthened by considering the relative positions of the Board and the opposite party under the Act as presently understood, as compared with their relative positions under the Act as interpreted by the Board.

The employer, when he is before the Court, is concluded by the record which he has made before the Board. If he has not properly raised his constitutional, procedural or substantive objections, he may not raise them in the court, however valid they may be, unless his fail-

* See N.L.R.B., Rules and Regulations, Series 1, as amended, Sec. 36.

ure or neglect "shall be excused because of extraordinary circumstances" (Sec. 10(e)).

He is, moreover, concluded by the testimony in the record, and may not supplement it unless he can establish "that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board" (Sec. 10(e)).

It may be noted in passing that, after the Board's order in the present case was made, petitioner filed a petition for leave to take additional testimony before the Board, pointing out serious omissions in the Board's report and findings, including its failure to mention by a single word the condition of industrial affairs which was the background of every fact referred to in the report, namely, the wave of sit-down strikes in the State of Michigan and elsewhere during the period which the report covered.

This petition the Board denied when the ink on the filing stamp was hardly dry (R. 5). While we have no doubt that the Board makes every effort to perform its duties impartially as it sees them, we can hardly believe it would have dealt thus summarily with a similar petition by its prosecuting arm or with a conclusion of its review division that the Board's evidence to support the charges was "incomplete." *

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* Thus in its Annual Report for the year ended June 30, 1936, the Board stated, under the heading "Procedure of the Board" (p. 25):

> "The Board, after examination of the record, may conclude that the record is incomplete, in which event it may require the taking of further evidence before the Board or a trial examiner (art. II, sec. 36, Rules and Regulations). Usually, the Board requires the taking of further evidence on its own initiative. . . ."

We have said that the employer, when he gets to court, is concluded by the record. He is also concluded by any finding which is "supported by evidence"; and, however much the preponderance of evidence may be in his favor, the court is powerless to enforce its own conception of the truth as established by the record.

Nor did the employer have the advantages of the Board's prosecuting department in the obtaining and putting in of testimony. The Board has the broadest investigatory powers, including access to the employer's files and the right to copy evidence therefrom,* and a sweeping power of subpoena to compel the attendance of witnesses and the production of evidence "from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The employer, on the other hand, has no access to the files or records of any complainant, and has no power of compulsory processes. If he desires a subpoena—a right which any private litigant may obtain as of course, and generally from the clerk of any court in which his suit is pending—he must make application to the Board therefor, and in such application must disclose not only the names of his witnesses but also the nature of the testimony which he proposes to adduce by each of them, after which the Board may grant the subpoena if it sees fit. N.L.R.B.

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* The Board has the power to file a complaint against any person, without limitation, "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice" (Sec. 10 (b)). The Board is not required, before filing a complaint, to make any investigation of the charge (though doubtless it does make some investigation), or to satisfy itself that the charge has been made by a responsible person or has a basis of fact, or to make any finding of public interest.

Rules and Regulations, Series 1 as amended, Art. II, Sec. 21.

The only substantial rights conferred upon the employer are in respect of judicial review. Prior to the time when the issues are made in the court, his express rights under the statute are confined (Sec. 10(b), (c) and (d)) to the right to file an answer; "to appear in person or otherwise and give testimony at the time and place fixed in the complaint"; and to have notice of the original hearing, of any later hearing to take more testimony, of any argument before the Board, of the Board's order, and of its intention to make any change therein after it has been issued.

In view of the nature of these provisions, and of the sweeping powers which they confer upon the Board, the presence in the statute of effective provisions for judicial review is of the utmost importance.

The Board's construction of the Act would largely nullify those provisions. Nothing that the Board had done prior to submission to the court would be conclusive upon it. If in any respect the record should preclude it in respect of issues which it might like to raise, it would only have to dismiss or ask a remand in order to correct the record so as to raise such issues.

If the respondent had properly raised and preserved his constitutional and other objections to the Board's procedure, and raised meritorious defenses, the Board need not litigate them, but could simply divest the court's jurisdiction and endeavor to remove the issues. If the Board's pleadings were defective, it could take the case back and amend them.

Nor would it any longer be necessary for the Board, like the employer, to show good cause for the taking of

additional testimony if it should desire to do so. It would merely have to divest the jurisdiction of the court and take such additional testimony at its pleasure, and without according any correlative right to the opposite party.

It is submitted that under the Board's construction of the list, no effective judicial review of its orders could ever be had except with the Board's consent.

There is one other phase of the Board's policy argument which deserves mention—the argument that it is in some way "expediting," or invoking a "power to expedite," the final determination of the issues, and that the court below remanded the proceeding in No. 183 in order to "avoid the decision of questions which it may not be necessary for it to decide" (Ans. Br. 56).

This thought is carried forward at the end of the brief, where the Board accuses us of arguing "that a court must take upon itself the burden of deciding questions which further administrative proceedings may render moot" (Ans. Br. 60), and says:

> "The contention not only imposes a completely unnecessary rigidity * upon the procedure of court review of administrative orders, but runs counter to the well settled policy that a court will not itself attempt to decide issues where they may be determined by further administrative proceedings. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 468; *United States* v. *Illinois Central R. R. Co.,* 291 U. S. 457, 463; *Utley* v. *St. Petersburg,* 292 U. S. 106, 109-110. * * *"

* Under the Board's theories, the procedure of judicial review, as respects the rights of the employer, would continue in all its "rigidity"; but as respects the Board all "rigidity" would be eliminated and the procedure would become completely flexible.

The cases cited have nothing to do with the proposition for which they are cited, but merely apply the familiar rule that, in matters within the jurisdiction of an administrative body, a party may not resort to the courts until he has exhausted his administrative remedies under the statute.

The suggestion about expediting the case is meaningless, because—assuming that no conclusion can be reached or assumption made as to the merits and legal effect of the petitioner's various defenses—no one can know whether the proposed procedure would in fact expedite or in fact delay the ultimate determination of the issues, except a clairvoyant who can look into the future and determine how the various defenses will ultimately be decided.

Moreover, the suggestion that the Board is avoiding "a long litigation" over questions which it is not necessary for the courts to decide, is a fictitious contention. There is no reason whatever why there should be a long litigation over the Board's failure to follow a procedure which finds sanction in the *Morgan* case, because the Board has already stated that it does not wish to litigate this point, and the court is entitled to act accordingly. If the Board hereafter changes its mind and decides to litigate the question, the fault cannot be attributed to the petitioner.

If on the other hand, as we think, it must be assumed (1) that petitioner's defenses are meritorious and (2) that a number of them, if ultimately established, would render nugatory the prior service of an interim report and exceptions and argument thereon, the Board is clearly not invoking a "power to expedite," but a power to delay and to defeat the prompt operation of the statutory provisions for judicial review of the Board's orders.

It is submitted that every consideration of public policy requires a reversal of the orders below.

Point VI—The Board's Jurisdictional Objections

We will not repeat the arguments with respect to the points of jurisdiction which we made in our brief (at pp. 74-86), but will confine ourselves to answering the new arguments which the Board now advances. In so doing, we again call attention to the fact that the jurisdictional point is of no importance unless the Court affirms the order in No. 182, since the whole basis of it is the alleged effect of the order of May 5 allowing the Board to withdraw its petition for enforcement.

The Board devotes a separate point in its brief (Point II, pp. 35-43) to an argument in which it seeks from this Court, in No. 183, relief which it did not request in the court below, namely, a dismissal of the petitioner's petition for lack of jurisdiction (Ans. Br. 35, 43). It asks this Court (at p. 36) to hold that the court below "was without jurisdiction to make the order,* and that it should therefore be reversed, and the case remanded to the court below with directions to dismiss the petition for lack of jurisdiction" (see also Ans. Br. 43).

In the Board's brief in opposition to the petitions for certiorari, it recognized that it had waived this point, saying that it did not ask for a writ of certiorari (at p. 14) because "the granting of this motion to remand has the same practical result as the granting of its motion to vacate would have had, namely to permit the Board to set aside its order against petitioner and take further proceedings."

As we said in our brief (p. 75), the making of the motion to remand was itself a waiver of the court's jurisdic-

* The order referred to is the order remanding the case to the Board.

tion, certainly in the light of the Board's failure to ask for review. Not only did the Board make no motion to dismiss in the court below, but it waived the jurisdictional point in another way. After the court on May 9 had made its order in No. 182 vacating its permission to the Board to withdraw the transcript of the record, and its order in No. 183 that the transcript should be deemed filed in that case, the Board moved the court to have the case (i.e., petitioner's petition in No. 183) set down for argument, and the court upon this motion advanced the case for argument at its June session*. This motion was a submission to the jurisdiction of the court, and the court treated it as such. It therefore properly denied the Board's motion to vacate the order of May 9 with respect to the transcript of record, even assuming that such motion was based upon the jurisdictional objections now advanced (R. 108).

The Board now argues that it did not waive the jurisdictional objections which it now makes because it could not waive them, as they go to the essence of jurisdiction of the subject-matter, and may be raised at any time or noticed by this Court upon its own motion.

Clearly the points are not of that character. On May 5, the date which is chiefly important, the court had jurisdiction of "the proceeding" under the express terms of the Act, and full jurisdiction of both the subject-matter and the parties. This the Board concedes (Ans. Br. p. 40).

The Board does not deny, nor could it deny, that on May 5 the court had power to assume jurisdiction of the

* A certified copy of such motion and a certified copy of the court's order pursuant thereto have been filed in this Court, as supplements to the transcript of record.

petitioner's case while relinquishing jurisdiction of the Board's case, by means of orders providing that the transcript of record should be deemed filed in the petitioner's case and that the Board might take a voluntary dismissal of its petition. This the answering brief in effect concedes (pp. 39-40).

The Board's objections simply go to the manner in which the court below exercised or failed to exercise its admitted powers. Such a point does not go to the essence of jurisdiction since "jurisdiction" includes the power to decide erroneously as well as correctly, *Binderup* v. *Pathe Exchange*, 263 U. S. 291, and presumably also includes the power to correct error if it has been made.

Nor does the Board deny that the court below, like all other courts, had a plenary power to correct, modify or set aside its own orders during the term at which they were made, and that it could have exercised that power fully and effectively on May 9.

All that the Board asserts is that a supervening event—the issuance of its notice of May 6 that it proposed to set aside its order on May 10—prevented the court from exercising on May 9 its plenary power to modify its order of May 5 so as to accomplish its purpose, namely, to recognize or assume jurisdiction of the petitioner's case while relinquishing jurisdiction of the Board's case.

The contention is (Ans. Br. 40)

> "The order of May 5, followed by the Board's action of May 6, like the dismissal of an appeal, 'ended the case in that court, and deprived it of all power to add to or alter the record as certified.' *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 552."

Board then goes on to contend that when a court
ce divested itself of jurisdiction and, pursuant
, jurisdiction "has vested in and been exercised by
r or other court," the first court cannot, by a recon-
ion of its decision, revest jurisdiction in itself. For
oposition it cites *Ex parte Skinner & Eddy Corp.*,
and, after discussing that case, finds further author-
decisions which, the Board claims, uniformly hold
ce a cause has been remanded by a federal district
o a state court, and the state court has had further
dings pursuant to the remand, "the federal court
erless to vacate its former order."

ther words, the general principle invoked by the
is that where an appellate or reviewing court makes
r of dismissal or remand, and thus ends its jurisdic-
the cause in the sense that it terminates the pro-
before it, any action taken by the lower or other
hereafter will defeat the appellate court's plenary
over its own orders during the term in which they
ade.

uch proposition of law has ever been applied by
rt, so far as we know. The Board's citations are
mple of its willingness to generalize from cases
with a peculiar situation and thus to produce a
rule opposite to the general rule in fact estab-
by the authorities.

ealty Acceptance Corp. v. *Montgomery*, 284 U. S.
e circuit court of appeals on a previous appeal,
firming a judgment, had vacated its affirmance so
one procedure or another, the district court could
ount of newly discovered evidence. This decision
proper (and on the subsequent appeal it was so

held) because, as we stated in our brief (p. 60), the trial court's term had expired and it had no power to consider newly discovered evidence; hence the circuit court of appeals had no power to remand the case for that purpose. After a new trial was had and another appeal taken, the appellate court held that its original action was improvident and restored its original judgment; and this Court affirmed.

The case in no way supports the Board's proposition, and its isolation of the words which it quotes at page 40 of its answering brief is a plainly mistaken representation of how the case was decided and what the words mean.

Ex parte Skinner & Eddy Corp., 265 U. S. 86, 95, though the Board describes it as "precisely applicable to the present situation, and * * * conclusive," is equally irrelevant. Following a voluntary dismissal of a suit in the Court of Claims, plaintiff began suit on the same claim in a state court, pursuant to statute, against the Emergency Fleet Corporation. Subsequently the Government applied to the Court of Claims to vacate the order of dismissal and for leave to file a counterclaim, and the court vacated such order and granted the leave prayed for. On writ of mandamus, this Court held that the action of the Court of Claims was improper, first because the plaintiff was entitled to the voluntary dismissal which he had asked for, and second because of the "special reason" that the governing statute expressly prevented a person from filing *or prosecuting* a suit in the Court of Claims after he had instituted another suit on the same claim in another court against a person professing to act for the United States.

The Court did not hold that any general principle would have prevented the court from restoring the case to its calendar at any time during the term of court in

which the voluntary dismissal had been granted, if it had been improperly granted. On the contrary, the Court expressly held that the jurisdiction which the Court of Claims had parted with could not "be resumed by a retroactive order * * * *in view of* the restrictive provisions" of the statute referred to.

The other cases which the Board cites, being those involving remands by district courts to state courts, are merely examples of a particular rule, based upon a statutory requirement, which applies solely to cases where the remand is on the ground of improper removal. Being based on an express statute (Jud. Code § 23), they are recognized to be a strictly limited exception to the general rule that a court may set aside its own judgment or order during the term at which it was entered. *Empire Mining Co.* v. *Propeller Tow-Boat Co.*, 108 Fed. 900, 904-05; *cf. Travellers' Protective Assn.* v. *Smith*, 71 F. (2d) 511.

Moreover, in the only one of the Board's cases in which the rule was actually applied, the Court expressly stated that it was immaterial whether or not the state court had taken further proceedings. See *Ausbrooks* v. *Western Union Telegraph Co.*, 282 Fed. 733, 734.

The rule does not apply to remands of cases from federal to state courts on any other ground except improper removal, and in any other case the district court may vacate its order of remand, as one of the Board's cases clearly shows, *Travellers' Protective Ass'n.* v. *Smith*, 71 F. (2d) 511, 513; *cf. Bankers Securities Corp.* v. *Insurance Equities Corp.*, 85 F. (2d) 856, 860, and without inquiring whether or not proceedings have been had in the state court subsequent to the remand.

The only effect of the Board's authorities is to confirm the principle, which was fully applicable below, that,

in so far as the court's orders of May 5 were inconsistent with a recognition of jurisdiction of the petitioner's case, the court had full power to amend them; and it exercised that power on May 9.

There is no substance in the Board's contention that the order of May 9 with respect to the transcript of the record could not have a "retroactive" effect. All orders of a court which vacate its previous orders have a "retroactive" effect, and restore, or require to be restored, the situation as it would have existed if the original order had never been made.

The point is that the Board made an order on May 5 with respect to the withdrawal of the record, which order it later found to be improvident, and annulled. The court having so held, and having thus exercised its familiar judicial powers for the purpose of making clear its recognition of, and intention to assume, jurisdiction of the petitioner's case—and the Board not having asked for a review of the order in question—it has no standing to urge before this Court that the order of May 5, insofar as it granted leave to withdraw the certified transcript, was correct and should not have been annulled by the order of May 9.

The suggestion that the Board, by issuing its notice of May 6, could prevent the court from exercising its plenary power over its own orders is without support in the authorities. Even if the order of May 5 granting permission to the Board to withdraw its petition and the transcript could be treated as a final disposal of the proceeding (instead of merely as a permission to the Board to take a step which, if taken, would have terminated the proceeding), the court could still annul the effect of such order, since all judgments, decrees or other orders of the

court, however conclusive in character, are under the control of the court which pronounces them during the term at which they are rendered, and they may be set aside, vacated, modified or annulled by that court. *Zimmern* v. *U. S.*, 298 U. S. 167; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Ayres* v. *Wiswall*, 112 U. S. 187.

The order of May 5 is certainly no more final than a decree dismissing an original bill in equity, which can be reversed, upon re-hearing, like any other final order during the term at which it was entered (Rules of Civil Procedure, Rule 60(b), former Equity Rule 69); and no more final than the dismissal of an appeal, which can likewise be reconsidered and set aside, *Caldwell* v. *Texas*, 141 U. S. 209.*

The plenary power of an appellate court over its own orders continues during the term of court, even after it has sent down its mandate to the lower court. *Prudence Company, Inc.* v. *Fidelity & Deposit Co.*, 298 U. S. 642; *Bank of Commerce* v. *Tennessee*, 163 U. S. 416. A rule of this Court expressly provides that mandate shall issue "irrespective of the filing of a petition for rehearing," thus recognizing that the mandate and the lower court's subsequent action do not affect the power of the court upon rehearing. Sup. Ct. Rules, Rule 34.

It results from the foregoing discussion that the principal basis of the Board's jurisdictional argument—that the court could not exercise its plenary power over its May 5 order because of the Board's May 6 notice of its intentions as to future action—is totally without support in the authorities; that in fact the authorities all show that it

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* This Court may reconsider the denial of a petition for certiorari, even where the motion for a rehearing thereon is made after the time for making it has expired under its rules. *Irwin* v. *The Missouri Valley Bridge & Iron Co.*, 275 U. S. 572.

had such power and could exercise it as it did, and that such exercise rendered invalid any intervening action by the Board prior to May 9 when the May 5 order was vacated.

The Board's notice of May 6 could not deprive the circuit court of appeals of jurisdiction of the proceeding, and of the power to alter or set aside its May 5 order during the term at which it was entered any more than it could have prevented this Court from altering or setting aside such order on review by certiorari.

The other arguments of the Board with respect to its jurisdictional point do not require extended discussion.

The first is that the petitioner, when it filed its petition for review in No. 183, was not a "person aggrieved" by the Board's order within the meaning of the Act, because the Board had previously announced "that it would move to dismiss its own proceeding" and "would voluntarily grant that which petitioner sought—the setting aside of the order" and further proceedings to meet the requirements of the *Morgan* case.

Even assuming that such is what petitioner is asking (as it is not), still the argument merely begs the question. Whether or not the petitioner was a "person aggrieved" depends upon whether the Board had power to take back the proceeding and amend its own order. If so, and the *Republic* case applies, then it was not a "person aggrieved" by the order. If on the other hand the court, admittedly having jurisdiction in No. 182, either did not divest itself of that jurisdiction, or recognized and assumed jurisdiction in No. 183, then the Board had no power to amend its own order, and the petitioner was a "person aggrieved". At most, this argument is just another way of stating the jurisdictional argument dealt with above.

The third jurisdictional point of the Board relates to the alleged incompleteness of the record when the court made its order of May 9, by reason of the absence therefrom of the Board's notice of May 6. This, so far as it is a different point from that which we have discussed above, has been fully dealt with in our brief (pp. 84-86).

The Board does not now urge that Section 10(f) requires a duplication of physical transcript when one is already on file pursuant to a petition to enforce or review the same order of the Board. But, making a cryptic reference to the Act, it urges that the Act contemplates "at least an order consolidating the cases, or deeming the transcript on file in the first case filed in the second." (R. 39.)

It does not explain, however, why such an order is not purely a formal one, recognizing that a specific requirement of the Act need not in fact be met because the record on file is a sufficient compliance therewith. It wholly ignores the fact that, either under the statutes applicable to appeals, or (if that be not applicable) then under the specific ruling made by the court below, such record became available to the petitioner at the moment of time when it filed its petition.

The Board's arguments as to jurisdiction in petitioner's case are super-technical, unrealistic, and, even as such, unsound, and are, moreover, not of such a nature that they permit raising collaterally in this Court a question on which the Board has not asked for review by certiorari.

Respectfully submitted,

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December 12, 1938.

FILE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 183

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The orders sought to be reviewed were entered without opinion (R. 51, 108) and are unreported. The order of the National Labor Relations Board appears at R. 3.

JURISDICTION

The orders of the court below sought to be reviewed were entered on May 5, 1938, and June 10, 1938, respectively (R. 51, 108). The petition for writs of certiorari was filed on July 7, 1938. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In No. 182

Whether the Circuit Court of Appeals erred in granting the motion of the National Labor Relations Board for leave to withdraw its petition for enforcement so that the Board might set aside its order and take further proceedings.

In No. 183

Whether, when a petition to review an order of the National Labor Relations Board has been filed in the Circuit Court of Appeals, the court has power to remand the cause to the Board for the purpose of setting aside the Board's findings and order and taking further proceedings.

STATUTE INVOLVED

Pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Sup. II, Sec. 151 *et seq.*) are set forth in an appendix to this brief.

STATEMENT

No. 182

On January 7, 1938, pursuant to Section 10 (e) of the National Labor Relations Act, the Board filed in the court below in No. 182 (No. 7919 below, hereinafter called the Board's case) a petition for enforcement of its order issued pursuant to Section 10 (c) of the Act against petitioner on December 22, 1937, and at the same time filed a certified transcript of the record in the proceeding before the Board (R. 1, 6).[1] On April 11, 1938, petitioner filed an answer to the Board's petition for enforcement (R. 9), contesting the validity of the Board's order on various grounds including the contention that petitioner had been denied a full and fair hearing in that from August 3, 1937 (when the proceedings before the trial examiner designated by the Board were transferred to the Board in accordance with Article II, Section 37 of the Board's Rules and Regulations, Series 1, as amended) until December 23, 1937 (when the Board's decision and order were served upon petitioner) the Board did not communicate with petitioner with respect to the proceeding and did not afford petitioner an opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or order (R. 12).

[1] The certified transcript was supplemented on January 10, 1938, to include petitioner's return to the Board's decision and order (R. 8).

The answer prayed that the Board's petition be denied and dismissed and that the Board's order be set aside and the proceeding be remanded to the Board with directions to dismiss the complaint (R. 21).

On May 2, 1938, following the decision of this Court in *Morgan* v. *United States*, No. 581, October Term, 1937, decided April 25, 1938, the Board filed in the court below a motion for leave to withdraw without prejudice its petition for enforcement, and to withdraw the transcript of record filed in the court (R. 36). The Board's motion papers, adverting to the *Morgan* decision and to petitioner's answer, stated that if the motion were granted the Board would then set aside its said order, pursuant to Section 10 (d) of the Act, issue proposed findings to which the parties would be permitted to file exceptions and if they so desired to argue objections before the Board, and thereafter make its decision and order or take such further or other action as might be deemed advisable (R. 37). On May 5, 1938, petitioner filed a memorandum in opposition to the Board's motion (R. 41). On the same date the court granted the Board's motion (R. 51). On the following day, May 6, 1938, the Board served, pursuant to said order of the court, and in furtherance of the purpose set forth in its papers filed with the court, notice on petitioner that on May 10, 1938,[2]

[2] In view of the wording of Section 10 (d), the Board deemed such notice appropriate, rather than a forthwith setting aside of its order.

unless sufficient cause to the contrary should then appear, the Board would vacate and set aside its findings and order of December 22, 1937, for the purpose of further proceedings before the Board (R. 54).. On May 10, 1938, petitioner having objected that by reason of the pendency of a petition to review the Board's order filed by petitioner (more fully explained in the following paragraph, in No. 183, No. 8019 below, hereinafter called petitioner's case), the Board was without jurisdiction to proceed pursuant to its notice of May 6, the Board held its action under advisement (R. 87). On June 4, 1938, petitioner filed a motion to vacate the court's order of May 5 granting the Board's motion for leave to withdraw (R. 56).[3] This motion was denied on June 10, 1938 (R. 58).

No. 183

Prior to the court's order of May 5 granting the Board's motion to withdraw, but subsequent to the

[3] The Board had not physically withdrawn from the court either its petition for enforcement or the certified transcript of record, believing such action unnecessary in view of the fact that it had exercised its leave by its notice of May 6, a copy of which was filed in the court on May 9 (R. 54, 80). One ground of petitioner's opposition to the Board's motion to withdraw was that the physical withdrawal of the record would prejudice its right to petition for a writ of certiorari (R. 49).

To avoid any conceivable doubt as to the Board's discontinuance, on June 2, 1938, after receipt of notice of petitioner's motion to vacate the order of May 5, the Board filed a formal withdrawal of its petition for enforcement (R. 55).

service and filing of said motion, petitioner, on May 4, 1938, initiated its case, No. 183, pursuant to Section 10 (f) of the Act, by filing a petition for a review of and to set aside the Board's order of December 22, 1937, being the same order of the Board involved in No. 182 (R. 62). On the same date petitioner filed a motion for an order directing that the causes be consolidated and that the transcript of record filed in the Board's case be deemed to be filed in petitioner's case (R. 39). On May 5, 1938, petitioner filed in its case a motion noticed for May 9, 1938, for an order directing that the certified transcript of record filed in the Board's case be deemed to have been filed in petitioner's case, or that the Board provide petitioner with a certified transcript of the entire record in the proceeding before the Board[4] and that the Board be enjoined from taking any action until 5 days thereafter (R. 78). On May 9, 1938, notwithstanding the further proceedings then in progress and pending before the Board, the court, amending its order of May 5 in so far as it permitted the withdrawal of the certified transcript of record in the Board's case, ordered that the certified transcript of record be and remain in the files of the court (R. 54), and further ordered that such transcript be deemed to have been filed

[4] Petitioner at no time made a request of the Board for a certified transcript of the record (see R. 78–9). Cf. *In re Petition of National Labor Relations Board*, No. 21, Original, October Term, 1937, decided May 31, 1938.

in petitioner's case as of the date of the filing of its petition for review (R. 80). Following the decision of this court in *In re Petition of National Labor Relations Board*, No. 21, Original, October Term, 1937, decided May 31, 1938 (reprinted R. 90), the Board on June 2, 1938, filed in petitioner's case a motion to vacate and set aside the order directing that the certified transcript of the record filed in the Board's case be deemed to have been filed in petitioner's case as of the date of the petition for review (R. 85), and also filed a motion to remand the cause to the Board for further proceedings in the event that the court denied the motion to vacate (R. 103). The Board in its motion to remand advised the court that if the motion were granted the Board forthwith would set aside its findings and order of December 22, 1937, issue proposed findings to which the parties would be permitted to file exceptions and argue objections before the Board if they so desired, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as might be deemed advisable (R. 104). On June 10, 1938, the court issued an order denying the Board's motion to vacate but granting its motion to remand the cause to the Board for the purpose of setting aside its findings and order of December 22, 1937, issuing proposed findings, and making its decision and order upon a reconsideration of the entire case (R. 108). The court stayed the order of remand and the Board's withdrawal of its petition for en-

forcement for 30 days pending application by petitioner to this Court for writs of certiorari and until final disposition thereof by this Court (R. 108). The court sustained objections to interrogatories which had been propounded by petitioner (R. 108) and denied various motions and applications of petitioner not now in question or material (R. 58, 108).

The petition herein seeks a writ of certiorari to review the order of May 5, 1938, in the Board's case, granting the Board's motion for leave to withdraw its petition for enforcement without prejudice, and a writ of certiorari to review the order of June 10, 1938, in petitioner's case, remanding the cause to the Board.

ARGUMENT

I

Nos. 182 and 183

THERE IS NO OCCASION FOR A REVIEW OF THE ORDERS AT THIS TIME

The effect and purpose of the orders sought to be reviewed are to permit the Board to set aside its findings and order issued against petitioner on December 22, 1937, and have further proceedings. The questions now presented are raised in an interim stage of the proceedings. Petitioner has not made a showing that this is one of the "extraordinary cases" in which the writ of certiorari will be granted prior to the final disposition of a contro-

versy. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258.

Petitioner is not prejudiced except by the prospect of participating in further proceedings. Indeed, the setting aside of the Board's order was the very relief prayed by petitioner in its answer (R. 21) and prior thereto, on January 3, 1938, in its petition to the Board to vacate and set aside the Board's decision and order and for rehearing (R. 31). Likewise, the opportunity to file exceptions to proposed findings of fact and to argue objections before the Board (R. 37, 104) offers petitioner the very opportunity which it complained had been denied to it (R. 12). Any order which the Board may make against petitioner in the further proceedings to be had can be tested upon petition to review or enforce, and at such time any question of the court's power to issue the orders now sought to be reviewed can be raised, and all essential rights of petitioner determined. Until then, there is no occasion for this Court to determine the validity of the orders.

II

No. 182

THE COURT DID NOT ERR IN GRANTING THE BOARD'S MOTION FOR LEAVE TO WITHDRAW ITS PETITION FOR ENFORCEMENT WITHOUT PREJUDICE

It is well settled for the Federal courts that a plaintiff has an absolute and substantial right to

dismiss or withdraw his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the prospect of a second litigation upon the subject matter. *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 19; *Ex parte Skinner & Eddy Corporation*, 265 U. S. 86, 93; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146; *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569 (C. C. E. D. Mich.); *Goldstein* v. *Philadelphia & Reading Coal & Iron Co.*, 17 F. (2d) 482 (C. C. A. 3d). In the absence of contrary statutory provision, this rule should apply to proceedings involving the enforcement of orders of administrative tribunals. Cf. *Jones* v. *Securities & Exchange Commission*, *supra*, p. 19. In No. 182, the Board may be regarded as the plaintiff below. The only relief to which petitioner herein was entitled under the statute was to have the order set aside or modified; the Board sought to withdraw its order for the purpose of setting it aside and taking further proceedings. The only prejudice which petitioner can possibly suffer is the prospect of engagement in further proceedings. This Court has repeatedly said that this is not the sort of prejudice which can bar a plaintiff from exercising his absolute right to withdraw. (See cases cited above.)

Petitioner attempts to meet this insuperable difficulty in its position by claiming that it became

entitled to "affirmative relief" upon the filing of the Board's petition for enforcement and petitioner's answer thereto. Petitioner nowhere makes clear what "affirmative relief" it is entitled to; apparently it comprehends within these words the setting aside of the Board's order, if invalid. A designation of such relief as "affirmative" is a misuse of the term. The setting aside of an order, having no greater effect than a denial of the prayer of a petition to enforce, is not "affirmative relief" barring the plaintiff's right to a nonsuit. Cf. *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson,* 84 F. (2d) 330, 331 (C. C. A. 4th). Moreover, even a defendant who has filed a proper prayer or cross-bill for affirmative relief must show that the dismissal would result in prejudice other than the mere prospect of future litigation. *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93–94; *City of Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569, 575 (C. C. E. D. Mich.); *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson,* 84 F. (2d) 330, 331 (C. C. A. 4th). Petitioner has made no such showing.[5]

[5] In *Ex parte Skinner & Eddy Corp., supra,* relied on by petitioner, the Court stated that a case would not be dismissed to the prejudice of a defendant who had sought affirmative relief. "Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree." 265 U. S. at 94. But like the Government's unsuccessful objection in the *Skinner & Eddy* case, petitioner's opposition to the withdrawal was not predicated upon any time or expense given to the preparation of its case for "affirmative relief." See memorandum in opposition, R. 41–50.

Further, even after a showing of prejudice to the defendant, a court, in the exercise of a sound discretion, may grant a motion to dismiss or withdraw. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146; *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, 573 (C. C. E. D. Mich.); *United Motors Service* v. *Tropic-Aire*, 57 F. (2d) 479, 488 (C. C. A. 8th). Likewise it may permit the discontinuance of an appeal from a lower court notwithstanding the resistance of the appellee. *United States* v. *Minn. & N. W. R. Co.*, 18 How. 241. Petitioner makes no claim that the court abused its discretion. Consequently there is no occasion for granting certiorari.

Petitioner contends further that the Act provides without limitation that once the court acquires jurisdiction it can not relinquish it, but is under a duty to proceed forthwith to a decree (Pet. p. 16). The Act does not require the court to enter a decree; it provides that the court "shall have power" so to do (Section 10 (e)). Petitioner's argument leads to the absurd conclusion that it would be mandatory for the court to inquire into the merits and proceed to a decree even where neither party desired it to and where the petitioning party had abandoned its suit.

III

No. 183

IF THE COURT HAD JURISDICTION AT ALL IN PETITIONER'S CASE IT HAD POWER TO REMAND THE CAUSE TO THE BOARD

In No. 183 petitioner seeks to review the order of the court below remanding the cause to the Board for the purpose of setting aside the Board's order and taking further proceedings. The order of the Board here involved is the order of December 22, 1937, the same order involved in No. 182. Petitioner brought its case, May 4, 1938, only for the purpose of preventing the Board from setting aside its order and proceeding as it had proposed in its motion for leave to withdraw its case, filed May 2, 1938. See R. 49–50. If there is no occasion to review the order involved in No. 182, there is certainly no occasion to review the order involved in No. 183. The former order was sought in order to permit the Board to take further proceedings. Such order being proper, the proceedings should not be halted merely because petitioner chose to file in the court below a redundant petition to review the Board's order.

It is necessary to point out that there is serious doubt whether the court below had jurisdiction to take any action in petitioner's case. A certified copy of the transcript of record was never filed by petitioner in the manner prescribed by the statute. It was only by virtue of the accident of the physical

presence in the files of the court of the record, which had been previously filed in the Board's case (although the court had, on May 5, granted the Board's motion to withdraw its petition for enforcement and the transcript of record), which enabled the court, on May 9, to order that the transcript not only remain in its files but be deemed to have been filed in petitioner's case (R. 80). Under the decision of this Court in *In re Petition of National Labor Relations Board, supra*, it is questionable whether the court had jurisdiction to make such an order.* The Board believes that the court should have granted the Board's motion to vacate the order of May 9 (R. 85) instead of its alternative motion to remand (R. 103), for the reason that the court had not obtained jurisdiction of the petitioner's case. The Board, however, does not petition for a writ of certiorari, for the granting of its motion to remand has the same practical result as the granting of its motion to vacate would have had, namely, to permit the Board to set aside its order against petitioner and take further proceedings.

If jurisdiction in the court be assumed, as apparently is done by petitioner, remanding the cause

*The transcript of record deemed filed was not the transcript of the "entire" record, as required by Section 10 (f) of the Act. The record which had been certified and filed in the court in January in the Board's case obviously did not include the Board's notice of May 6 and did not exhibit "the Board's final action" (*In re Petition of National Labor Relations Board, supra.*)

was an appropriate method by which to permit the Board to complete the further proceedings which it desired to take and which were pending before it. The court properly decided to await the completion of those proceedings and not to embark upon a determination of the validity of an order which petitioner wished to have set aside and which the Board itself had given notice that it would set aside. The Act contains no provision limiting the inherent power of a circuit court of appeals to remand the cause with or without deciding the merits.

As early as *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 239, it was stated, even in the absence of statutory authorization, that if "the [Interstate Commerce] Commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court * * * should * * * send the case back to the Commission to be lawfully proceeded in." See also *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302. And the existence of this power to expedite, notwithstanding the absence of an express statutory provision, has been more recently recognized in cases involving the analogous Federal Trade Commission Act.[7] *Federal Trade*

[7] Like § 10 (e) of the National Labor Relations Act, § 5 of the Federal Trade Commission Act provides that upon the Commission's filing of a petition to enforce and transcript, the court "shall have power to make and enter * * * * a decree affirming, modifying, or setting aside the order of

Comm. v. *Curtis Publishing Co.*, 260 U. S. 568, 580, 583; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 297; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218.

Petitioner takes the view that the court may remand a case to the Board only for the one reason specifically stated in the statute, i. e., for the taking of additional evidence. The plain implication is that courts have no inherent powers when dealing with orders of administrative tribunals, that they can do only what Congress expressly tells them to do. Petitioner cites no authority for this view and it is opposed by the common practice of the courts in connection with other administrative tribunals. (See cases cited above.) There is no reason why, in their review of orders of administrative tribunals, courts should not exercise familiar, procedural, judicial powers not repugnant to the statutory scheme.

It has never been held that a circuit court of appeals in remanding a case for further proceedings must first determine the validity of the order of the administrative tribunal and set it aside if found to be invalid for any reason. Familiar analogous situations may be cited. An appellate court may return a record to a lower court on the application of

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the commission." The statute contains a provision for orders for additional evidence to be taken before the Commission upon application by either party, and no other express provision for remand. Act of September 26, 1914, c. 311, 38 Stat. 719 (U. S. C., Title 15, § 45).

the latter so that further proceedings or a rehearing may be had below, without deciding on the merits. *Roemer* v. *Simon*, 91 U. S. 149; *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902 (C. C. A. 2d), reversed on other grounds, 274 U. S. 316. See *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547; *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10th). Even without such an application an appellate court may remand to the lower court for further supplementary proceedings without deciding the appeal. *Ballard* v. *Searls*, 130 U. S. 50; *Jensen* v. *New York Life Ins. Co.*, 50 F. (2d) 512 (C. C. A. 8th); see *Podlesak* v. *McInnerney*, 26 App. D. C. 399. A court of equity has inherent power to recommit a special master's report upon his application for a withdrawal of it for reconsideration by him. *National Folding-Box & Paper Co.* v. *Dayton Paper-Novelty Co.*, 91 Fed. 822 (C. C. S. D. Ohio); *Citizen's Bank* v. *Davis*, 126 S. C. 175. No reason or authority can be advanced for a contention that the inherent power which courts possess in these situations may not equally be exercised when orders of administrative tribunals are in question.

Petitioner relies on *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, for the proposition that a circuit court of appeals may not remand a case to the district court with either direction or permission to take further proceedings and thereafter enter a new decree, without first setting aside the decree or order appealed from. In that case

the term of the district court had apparently expired,[5] and the order of remand was so vague and ambiguous that the district court failed to understand that it was required to set the decree aside. Instead it permitted evidence to be introduced on a narrow point and simply adjudged that its original decree should not be set aside. Despite this misunderstanding and mistrial, the Circuit Court of Appeals proceeded to pass upon the validity of an Act of Congress and reversed the decree with directions to dismiss the bill for want of equity. Here the order of the Circuit Court of Appeals is plain; the cause is remanded to the Board "for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case" (R. 108). The essential defect of the proceedings in the *Duke* case, the fail-

[5] See 299 U. S. 263, 265. This Court stated (p. 268): "*In this instance*, the Circuit Court of Appeals could not leave in effective operation the final decree of the District Court and at the same time revest that court with jurisdiction to retry the cause." (Italics added.) The expiration of the term left the district court powerless to change its decree (*In re Metropolitan Trust Co.*, 218 U. S. 312, 320; *United States* v. *Mayer*, 235 U. S. 55, 67; *Delaware, Lackawanna & Western R. Co.* v. *Rellstab*, 276 U. S. 1, 5) and rendered the circuit court of appeals powerless to bestow such authority upon the district court. *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547. In the case last cited this Court recognized that under *Roemer* v. *Simon*, 91 U. S. 149, a remand for trial without a vacatur would be proper where the term had not expired and where the remand was sought by the trial court.

ure to vacate the decree of the district court, is thus absent here, since the Board understands that it is to vacate its order, and the remand is in response to the Board's request that it be given the opportunity to do so.

Much of petitioner's argument reduces itself to the suggestion that the power to remand might be abused in some hypothetical case (Pet. Br. 22–25) [*] and does not really militate against the existence of the power. Here petitioner besought the court below to set aside the Board's order because of an alleged failure to grant a fair hearing. The Board then moved that the cause be remanded so that it might set aside its order and do what petitioner claimed it should have done. The court, in the exercise of its inherent powers, granted the motion. No claim is made of abuse of discretion in the exercise of that power. We are unable to see any justification for petitioner's claim that the action of the court below should be reviewed by this Court.

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[*] As for petitioner's fear that defects complained of in the petition to review and "thus directed to the attention of the Board" may prompt the Board to attempt to revest itself with jurisdiction, it should be noted that, under § 10 (e) of the Act, no objection that has not been urged before the Board may be considered by the court, except in extraordinary circumstances, in which event the Board might properly be afforded an opportunity to reconsider its decision and correct any errors. Cf. *Kovalsky* v. *American Employers Ins. Co.*, 90 F. (2d) 476, 480 (C. C. A. 6th).

CONCLUSION

There is no conflict in the decisions. No question of present importance is presented. There is no occasion for the granting of writs of certiorari.

Respectfully submitted.

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AUGUST 1938.

APPENDIX

Paragraphs (d), (e) and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Secs. 151–166) provide as follows:

> (d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.
>
> (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have

power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or

certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggreievd by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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United States Code, Title 28, Sec. 864

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 183

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The orders of the Circuit Court of Appeals (R. 51, 108) were entered without opinion and are unreported. The order of the National Labor Relations Board appears at R. 3.[1]

[1] The original findings of fact, conclusions of law and order of the National Labor Relations Board are reported in 4 N. L. R. B. 621.

JURISDICTION

The orders of the court below were entered on May 5, 1938, and June 10, 1938, respectively (R. 51, 108). The petition for writs of certiorari was filed on July 7, 1938, and granted on October 10, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 18, 1925.

QUESTIONS PRESENTED

In No. 182

Whether the Circuit Court of Appeals erred in granting the motion of the National Labor Relations Board for leave to withdraw its petition for enforcement so that the Board might set aside its order and take further proceedings.

In No. 183

Whether the Circuit Court of Appeals had jurisdiction to take any action in the case.

Whether, if the Circuit Court of Appeals had jurisdiction, it had power to remand the case to the Board for the purpose of setting aside its order and taking further proceedings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Supp. III, Sec. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 62–64.

STATEMENT*

On January 7, 1938, pursuant to Section 10 (e) of the National Labor Relations Act, the Board filed in the court below in No. 182 (No. 7919 below, hereinafter called the Board's case) a petition for enforcement of its order issued pursuant to Section 10 (c) of the Act against petitioner on December 22, 1937, and at the same time filed a certified transcript of the record in the proceeding before the Board (R. 1–5, 6). On January 10, 1938, the certified transcript was supplemented to include petitioner's return to the Board's decision and order (R. 8).

On April 11, 1938, petitioner filed an answer to the Board's petition for enforcement (R. 9–34), contesting the validity of the Board's order. Various grounds were relied upon, one of which was that petitioner had been denied a full and fair hearing in that from August 3, 1937, when the proceedings before the trial examiner were transferred to the Board until December 23, 1937, when the Board's decision and order were served upon petitioner, the Board did not communicate with petitioner with respect to the proceeding and did not afford petitioner an opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or order (R. 12). The answer prayed that the Board's petition be

*A chronological statement of the facts in both cases is set out in Appendix B, *infra*, pp. 65–68.

denied and dismissed, and that the Board's order be set aside and the proceeding be remanded to the Board with directions to dismiss the complaint (R. 21).

On May 2, 1938, following the decision of this Court on April 25, 1938, in *Morgan* v. *United States*, 304 U. S. 1, the Board, pursuant to notice of April 29, 1938 (R. 35), filed in the court below a motion for leave to withdraw its petition for enforcement and the transcript of record without prejudice, for the purpose of having further proceedings (R. 36–38). In support of the motion the Board adverted to the *Morgan* decision and to petitioner's answer, and stated that if the motion were granted the Board would then set aside its order, pursuant to Section 10 (d) of the Act, issue proposed findings to which the parties would be permitted to file exceptions and, if they so desired, to argue objections before the Board, and thereafter make its decision and order, or take such further or other action as might be deemed advisabde (R. 37). On May 5, 1938, petitioner filed a memorandum in opposition to the Board's motion (R. 41–50). On the same date the court issued an order granting the Board's motion (R. 51). On the following day, May 6, 1938, the Board, pursuant to the order and in furtherance of the purpose set forth in its motion, served notice on petitioner that on May 10, 1938, unless sufficient cause to the contrary should then appear, the Board would vacate and set aside its findings and order of December 22, 1937, for the

purpose of further proceedings before the Board (R. 54).[2] On May 10, 1938, due to petitioner's objection that the Board was without jurisdiction to proceed in view of the pendency of a petition to review the Board's order filed by petitioner (see *infra*) the Board held its action under advisement (R. 87). On June 4, 1938, petitioner filed a motion to vacate the court's order of May 5 granting the Board's motion for leave to withdraw (R. 56). This motion was denied on June 10, 1938, but the withdrawal[3] of the petition for enforcement was stayed pending application for a writ of certiorari (R. 58).

No. 183

Petitioner's case (No. 183, No. 8019 below) was initiated on May 4, 1938, by a petition, purportedly filed pursuant to Section 10 (f) of the Act, to set

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[2] In view of the wording of Section 10 (d), the Board deemed such notice more appropriate than a forthwith setting aside of its order.

[3] The Board had not physically withdrawn either the petition for enforcement or the certified transcript of the record from the clerk's office. It did not conceive that the granting of its motion contemplated or allowed the removal of any of the permanent records of the court (cf. *Cheney* v. *Hughes*, 138 U. S. 403) and, in addition, it believed that it had exercised the leave granted to it by the court by its notice of May 6, a copy of which was filed in the court on May 9 (R. 54–80). To avoid any conceivable doubt as to the Board's discontinuance, on June 2, 1938, after receipt of notice of petitioner's motion to vacate the order of May 5, the Board filed a formal withdrawal of its petition for enforcement (R. 55).

aside the Board's order (R. 62). May 4, 1938, the filing date, was prior to the court's order of May 5 granting the Board's motion for leave to withdraw its petition for enforcement, but was two days subsequent to the filing of that motion, and five days subsequent to the service of notice of that motion upon petitioner (R. 35). On May 4, 1938, petitioner also filed a motion for an order directing that the cases be consolidated and that the transcript of record filed in the Board's case be deemed filed in the consolidated case (R. 39). On May 5, 1938, petitioner filed in its case a motion noticed for May 9, 1938, for an order directing that the certified transcript of record filed in the Board's case be deemed to have been filed in petitioner's case, or that the Board provide petitioner with a certified transcript of the entire record in the proceeding before the Board[4] and that the Board be enjoined from taking any action until five days thereafter (R. 78). On May 9, 1938, notwithstanding the further proceedings then in progress and pending before the Board, the court, amending its order of May 5 in so far as it permitted the withdrawal of the certified transcript of record in the Board's case, ordered that the certified transcript of record be and remain in the files of the court (R. 54), and

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[4] Petitioner at no time made a request of the Board for a certified transcript of the record (see R. 78–79). Contrast *In re Petition of National Labor Relations Board*, No. 21, Original, October Term, 1937, decided May 31, 1938.

further ordered that such transcript be deemed to have been filed in petitioner's case as of the date of the filing of its petition for review (R. 80). Following the decision of this Court in *In re Petition of National Labor Relations Board*, No. 21, Original, October Term, 1937, decided May 31, 1938 (reprinted R. 90–102), the Board on June 2, 1938, filed in petitioner's case a motion to vacate and set aside the order directing that the certified transcript of the record filed in the Board's case be deemed to have been filed in petitioner's case as of the date of the petition for review (R. 85), and also filed a motion to remand the cause to the Board for further proceedings in the event that the court denied the motion to vacate (R. 103). The Board in its motion to remand advised the court that if the motion were granted the Board forthwith would set aside its findings and order of December 22, 1937, issue proposed findings to which the parties would be permitted to file exceptions and argue objections before the Board if they so desired, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as might be deemed advisable (R. 104). On June 10, 1938, the court issued an order denying the Board's motion to vacate but granting its motion to remand (R. 108). The court stayed the order of remand for 30 days pending application by petitioner to this Court for writs of certiorari and until final disposition thereof by this Court (R.

108). The court sustained objections to interrogatories which had been propounded by petitioner and ordered the interrogatories stricken from the record (R. 108), and denied other motions and applications of petitioner not now in question or material (R. 58, 108).

On July 7, 1938, petitioner filed a petition for, and on October 10, 1938, this Court granted a writ of certiorari to review the order of May 5, 1938, in the Board's case, granting the Board's motion for leave to withdraw its petition for enforcement without prejudice, and a writ of certiorari to review the order of June 10, 1938, in petitioner's case, remanding the cause to the Board.

SUMMARY OF ARGUMENT

I

No. 182

The order of the court below under review in this case is the order of May 5, 1938, granting the Board's motion for leave to withdraw its petition in accordance with its intention, following the decision in *Morgan* v. *United States*, 304 U. S. 1, to set aside its previous order and grant to petitioner the opportunity to except to proposed findings of fact and to make an oral or written argument to the Board. Petitioner, although it was being accorded what it had theretofore complained had been denied to it, opposed the Board's motion.

Notwithstanding that opposition, the Board, as a plaintiff, was entitled by the well-settled rule to discontinue its action. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 19.

A. Petitioner contends, first, that the rule has no application to proceedings to review an order of the Board. The sole reason advanced is that here, unlike ordinary litigation, there will probably be further proceedings before an administrative tribunal. That factor does not prove the rule inapplicable. It can equally well be evaluated in the light of the cases under the rule, and, when so considered, it is without weight.

B. Nor is there any applicable exception or qualification in the general rule. The claim that the prospect of further proceedings before the Board differs from the prospect of a second litigation, which admittedly is no bar to a dismissal, is without merit. The claim is completely formal, for the proceedings which petitioner now says are prejudicial are precisely those which it complains were denied to it. Furthermore, the contention necessarily rests on the assumption that the proposed further proceedings will be invalid or futile. Neither assumption may be made. The Court will not assume that the further proceedings will be irregular. Nor will they be futile, because, as many cases show, even if the court had passed upon and sustained petitioner's procedural objections to the order, the decision would have been no bar to

further proceedings before the Board and to the entry of a new order.

The claim that petitioner would be prejudiced because it had become entitled to affirmative relief on the filing of its answer is equally without merit. The answer prayed for no different or greater relief than that which petitioner would have obtained had it successfully defended the Board's action. Such a prayer can not be considered a prayer for affirmative relief. Moreover, even if petitioner had asked for affirmative relief, it cannot meet the further requirement that it was prejudiced.

However, even if petitioner were prejudiced in any way, the granting of the motion to dismiss was plainly within the discretion of the court below. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146. Petitioner did not in the lower court, and does not now in this Court, charge an abuse of discretion. Indeed, the question is probably not even before the Court. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182.

C. Nor does the Act require that, once a Circuit Court of Appeals has obtained jurisdiction, it must proceed to a decree affirming, modifying, or setting aside the order of the Board. The Act does not so state, and petitioner does not explain why it should be so construed. The Court will not assume a misuse of the Board's right to withdraw. Nor will

the Court speculate as to the validity of the contemplated further proceedings. *In re Petition of National Labor Relations Board, supra.*

II

No. 183

This case involves the order of June 10, 1938, remanding petitioner's case to the Board in order that it might set aside its order and take further proceedings. We believe that the order should be reversed with instructions to dismiss the petitioner's case because the court below never obtained jurisdiction.

Several jurisdictional prerequisites are lacking. First, petitioner is not a "person aggrieved" within the meaning of Section 10 (f). Its case was only a technical maneuver to prevent the Board from setting aside its order. The decision in *In re Petition of the National Labor Relations Board, supra,* is directly in point.

Second, there was never a transcript of the record filed as required by Section 10 (f). Jurisdiction did not attach by the filing of the petition to review. Prior to the attaching of jurisdiction, there had to be at least an order consolidating the cases, or deeming a transcript already on file to be filed in the case, and notice thereof given. Such an order was made on May 9, 1938, but at that time the court had granted the Board leave to with-

draw its petition for enforcement and the transcript of the record, the Board had, pursuant to this leave, reasserted its own jurisdiction, and the jurisdiction of the court below had come to an end. Once it had been lost it could not thereafter be regained. The attempt to make the order retroactive was unavailing. *Ex parte Skinner & Eddy Corp., supra,* at 95.

Finally, the record which was before the court was not the "entire record" required by Section 10 (f). In view of the notice of May 6, 1938, by which the Board had instituted the further proceedings for which it had withdrawn its case, the record which had theretofore been filed did not exhibit "the Board's final action." *In re Petition of National Labor Relations Board, supra.*

III

No. 183

If the court below did have jurisdiction to enter the order remanding petitioner's case to the Board, its order was correct and should be affirmed. There was no lack of power in the court to remand the case, and the power was correctly exercised.

A. Many decisions of this Court demonstrate that a Circuit Court of Appeals possesses an inherent power to remand a case to an administrative tribunal. The power has been recognized in many cases involving the Federal Trade Commission and

the Interstate Commerce Commission, and it has been exercised by four Circuit Courts of Appeals in cases arising under this Act. There is nothing in the Act which negatives this inherent power.

B. Nor was the court below, in the exercise of this power, required to set aside the order of the Board before remanding the case. Actually, petitioner's unsupported contention to the contrary is wholly formal, because the form of the remanding order is of no practical consequence. Further proceedings could be had whether the order was set aside by the court or not.

Apart from that, however, it has never been held that a Circuit Court of Appeals, in remanding a case to an administrative tribunal, must either enter a formal reversal or determine the validity of the order before remanding it. The action of the court below is in accord with that of three other Circuit Courts of Appeals under this statute. It is supported by the closely analogous cases in which an appellate court, without reversing the decree of the lower court, grants the latter's request for the return of the record for further proceedings or sends it back without such a request. It is also supported by the cases in which a court has remanded a report to a master for reconsideration without setting aside the report.

There are many other instances in which this Court has declined to decide the issues but has entered purely formal reversals and has remanded

the cause for further proceedings. In those cases formal reversals served either to enable the lower court to take further proceedings after its term had expired, or to preserve the right of the parties to a later appeal on the merits. In *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, on which petitioner relies, the term of the District Court had expired. In the present case, since the Board has no term, a formal reversal would have served no purpose.

ARGUMENT

I

No. 182

THE MOTION OF THE BOARD FOR LEAVE TO WITHDRAW ITS PETITION WITHOUT PREJUDICE WAS PROPERLY GRANTED

The order of the court below under review in this case (No. 182, No. 7919 below) is the order of May 5, 1938 (R. 51), granting the Board's motion for leave to withdraw its petition without prejudice.[5] The motion was made by the Board in accordance with its determination, following the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1, not only to change its practice for the future, but also, in all pending cases in which complaint had been made of the omission of an intermediate re-

[5] The order of May 5, 1938, was amended, insofar as it allowed the withdrawal of the certified transcript of the record, by an order of May 9, 1938 (R. 54), that the transcript remain in the files of the court.

port or proposed findings, and of the absence of oral or written argument to the Board, to vacate its orders, restore the cases to its docket, and to reconsider and redetermine them after full opportunity to all parties to make exception to proposed findings and to make oral or written presentation of their contentions. See *In re Petition of National Labor Relations Board, supra.* In accordance with that determination, the Board, in several cases other than the instant one, discontinued its petitions for enforcement after the records had been filed in the Circuit Court of Appeals.[8] In the present case, although petitioner first complained of the absence of an intermediate report and of other proceedings before the Board, and prayed that the Board's order be set aside (R. 9, 21), it has now chosen to resist the motion by which the Board sought voluntarily to set aside its order and to have the proceedings, the lack of which it had protested.

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[8] *National Labor Relations Board* v. *Protective Motor Service Co.*, June 27, 1938 (C. C. A. 3d); *National Labor Relations Board* v. *Cherry Cotton Mills*, August 22, 1938 (C. C. A. 5th); *National Labor Relations Board* v. *Washington Manufacturing Co.*, June 29, 1938 (C. C. A. 6th). The motion of the Board to withdraw or dismiss without prejudice was granted in each case. The motion of the Board to remand the cause upon a petition to review after the filing of the record was granted in *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 97 F. (2d) 1010 (C. C. A. 9th), pending on petition for certiorari, No. 340.

Despite that opposition the Board, standing in this case as plaintiff in the court below, was entitled as of course to discontinue its action. The general rule is well settled in the federal courts. A plaintiff has a substantial right to dismiss or withdraw his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the prospect of a second litigation upon the subject matter of the complaint or bill. The right is absolute; although an application must be made, the court does not have even a discretionary power to deny a plaintiff's request under such circumstances. *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1, 19; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476; *McGowan* v. *Columbia River Packers' Ass'n,* 245 U. S. 352, 358; *Pullman's Palace Car Co.* v. *Central Transportation Co.,* 171 U. S. 138, 146; *Veazie* v. *Wadleigh,* 11 Pet. 55, 59, 61–62; *City of Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569, 572 (C. C. E. D. Mich.). The right plainly exists in favor of the Government, as well as in favor of other parties plaintiff. Cf. *Confiscation Cases,* 7 Wall. 454, 457, 458; *United States* v. *Brooks,* 44 Fed. 749 (Wash.); *United States* v. *Woody,* 2 F. (2d) 262 (Mont.); *United States* v. *Rossi,* 39 F. (2d) 432, 433 (C. C. A. 9th).

Petitioner's attempt to avoid the application of the rule is based upon three grounds. First, it contends (Br., pp. 27–28) that the rule with respect to voluntary dismissals stated in the cases cited above is completely without application to proceedings for enforcement or review of orders of the Board. Second, it contends (Br., pp. 29–37) that, even if the rule is applicable, it does not, because of its qualifications or exceptions, sanction the dismissal of the Board's petition in the present case. Finally, it contends (Br., pp. 17–27) that the provisions of the National Labor Relations Act prevent the voluntary dismissal of the Board's petition. We shall discuss each in turn.

A. THE GENERAL PRINCIPLES GOVERNING VOLUNTARY DISMISSALS ARE APPLICABLE TO PROCEEDINGS FOR ENFORCEMENT OF ORDERS OF THE BOARD

Petitioner's first contention is that the general principle stated above is wholly without application to a proceeding for review of an order of the Board. Br., pp. 27–28. The argument does not rely upon any provision of the Act; rather, it attempts to establish a fundamental inapplicability of the rule solely upon the ground that where a petition for enforcement is dismissed there may be further proceedings before an administrative tribunal, whereas when an ordinary civil litigation is ended by a voluntary dismissal there is likely to be at least a temporary termination of all further action.

The contention is easily disposed of. It does not in the least demonstrate that the general rule is inapplicable, but rather presents an argument—an unsound one, as we shall show below (pp. 19–23)—for the application of one of the well-settled exceptions to the rule: that a plaintiff will not be allowed voluntarily to dismiss his action if the defendant will be prejudiced in some other way than by the prospect of further litigation. On that basis the argument is without merit. Moreover, a voluntary dismissal will be granted even if it is sought for the express purpose of instituting or continuing the litigation in other courts. *Harding* v. *Corn Products Refining Co.*, 168 Fed. 658, 665 (C. C. A. 7th), certiorari denied, 214 U. S. 515; *Prudential Insurance Co. of America* v. *Stack*, 60 F. (2d) 830, 832 (C. C. A. 4th); *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson*, 84 F. (2d) 330, 331 (C. C. A. 4th). See *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 92, 93, 95; *City of Detroit* v. *Detroit City Railway*, 55 Fed. 569, 571–572 (C. C. E. D. Mich.).

B. THE RULE ALLOWING VOLUNTARY DISMISSALS HAS NO QUALIFICATION OR EXCEPTION WHICH APPLIES TO THE PRESENT CASE

Petitioner also contends that, even if the present case is to be governed by the general rule with respect to voluntary dismissals, nevertheless the court below erred in allowing the dismissal of the Board's case. The contention is founded upon the ground that petitioner would be prejudiced, first, by something other than the prospect of a second

litigation (Br., p. 28), and, second, by the waste of its time and energy in preparing its case for "affirmative relief" (Br., pp. 27–37). We believe both contentions to be unsound, not only because the asserted prejudices do not in fact exist but also because, even if there were prejudice, the dismissal was discretionary with the court below, and the discretion cannot be said to have been abused.

1. Petitioner's contention (Br., p. 28) that it would be prejudiced by something other than the prospect of a second litigation (*Ex parte Skinner & Eddy Corp., supra*) is based upon the fact that it must partake in further proceedings before the Board. It is this factor which is relied upon in Part A, *supra*, as the basis for petitioner's contention that the general rule stated in the *Skinner & Eddy* case has no application whatever to proceedings for the review of Board decisions. As we there indicated, this contention should be considered in the light of cases under the rule, rather than a consideration over and above it.

When so considered, it is entirely without foundation. There are several reasons why the prospect of further proceedings before the Board cannot be considered different from the prospect of a second litigation, which is admittedly insufficient to bar the exercise of an absolute right to dismiss. See pp. 17–18, *supra*. At best, petitioner's contention is a highly formal one which completely lacks reality. The "further proceedings" which petitioner now claims will prejudice it are precisely those which petitioner complained,

both to the Board and to the court below, had been denied to it (R. 17, 30–31). Indeed, in view of petitioner's allegation that the order of the Board should be reversed for lack of a fair hearing before the Board, petitioner should consider it a saving rather than a prejudice to have the further proceedings without the necessity of litigation.

Moreover, it is plain that the prospect of further proceedings before an administrative tribunal is simply the prospect of further litigation. The rule is not conditioned on the *certainty* of further proceedings. See pp. 17–18, *supra*. Nor are proceedings before an administrative tribunal more prejudicial than those before a court. In fact, the contrary is probably true. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209. Such proceedings are simply "part of the social burden of living under government." *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97, 100 (C. C. A. 5th), certiorari denied, 299 U. S. 559. Wholly apart from the fact that the proceedings are exactly what petitioner has previously asked for, therefore, the proceedings do not form any sound basis upon which to base a claim of prejudice.

The validity of this conclusion becomes even clearer when one examines the premises upon which the argument rests. Obviously, petitioner can

claim that the further proceedings before the Board will be prejudicial only upon the assumption that they will be invalid, or that, if the case were to be decided in the court below, it would be ended entirely—that the court would find petitioner's procedural and other objections meritorious and would leave the Board no alternative except a completely new proceeding from start to finish. We submit that neither assumption may be made.

The first assumption clearly is out of place; indeed, although indulged in by petitioner in opposing the Board's motion (R. 47–48), and again in its petition for certiorari, it appears to have been largely abandoned in petitioner's brief. Contrary to petitioner's unfounded allegations, the Board does not intend merely to go through the motions of further proceedings in an effort to "patch up its record" (R. 47). Actually, petitioner is being accorded the right to present to the Board any and all objections it may have both to the procedure of the Board and to the substantive merits of the case. The Board has stated that it will reconsider the entire case (R. 37, 104). Certainly the Court will not speculate as to the validity of the proceedings, nor will it assume that they will be irregular in any respect. *In re Petition of National Labor Relations Board, supra; Dalton Adding Mach. Co.* v. *Virginia,* 236 U. S. 699, 701; *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394, 398.

Nor can petitioner validly assume that, had the case been decided in the Circuit Court of Appeals, the whole proceeding would be at an end. If the court had upheld petitioner's contention that it had been denied a fair hearing before the Board, it "would have been ground only for setting aside the order without inquiry into its merits." *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, 259. Probably the court would have reversed the order without prejudice to a new order. Cf. *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, 676; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 29; *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 33; *James S. Kirk & Co.* v. *Federal Trade Commission*, 59 F. (2d) 179, 181, 183 (C. C. A. 7th), certiorari denied, 287 U. S. 663; *Federal Trade Commission* v. *Mid West Mills*, 90 F. (2d) 723 (C. C. A. 7th). It might well have directed that the case stand for further hearing before the Board. Cf. *Atlanta, B. & C. Ry. Co.* v. *United States*, 28 F. (2d) 885 (N. D. Ga.), 158 I. C. C. 6, 37 F. (2d) 401 (N. D. Ga.), 282 U. S. 522, 201 I. C. C. 645, 12 F. Supp. 782 (N. D. Ga.), 296 U. S. 33; *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.); *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302. See *United States* v. *Griffin*, 303 U. S. 226, 228, 229.

But even if the court merely set aside the order, its action would not necessarily bar further proceedings before the Board or be *res judicata* of another order by the Board. Cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 55–6, 64; *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522, 530. See also *Florida* v. *United States,* 282 U. S. 194, 186 I. C. C. 157, 190 I. C. C. 588, 4 F. Supp. 477 (N. D. Ga.), 292 U. S. 1; *United States* v. *Griffin,* 303 U. S. 226; *Baltimore & Ohio R. R. Co.* v. *United States,* 24 F. Supp. 734 (N. D. N. Y.), in all of which the contention of *res judicata* was unsuccessfully advanced. Thus the whole basis upon which the formal argument of petitioner is based falls to the ground. For the court to have denied the motion "would be to say that the courts are anxious to encourage litigation." *Thomson-Houston Electric Co.* v. *Holland,* 160 Fed. 768 (C. C. N. D. Ohio).

2. Petitioner, citing *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93–94, next contends (Br., pp. 27–37) that the Board may not dismiss its proceeding in the present case because, in the language of the opinion in that case, petitioner—

> is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action.

That the general rule is qualified to that extent is unquestioned, but it is equally clear that upon the

facts of the present case the qualification has no application whatever.

Petitioner's assertion that it became entitled to affirmative relief is based upon its answer to the petition filed by the Board (R. 12)[7] in which it prayed (R. 21)—

> that the petition herein be denied and dismissed, and that the purported order of the Board be set aside and the proceeding remanded to the Board with direction to dismiss the complaint, and respondent prays for such other and further relief in the premises as may be just and proper.

No answer is required, or even provided for, under the Act. Assuming, however, that the answer was a proper pleading, it is very difficult to see wherein it seeks "affirmative relief." When the Board filed its petition for review, the court below was empowered to enforce the order of the Board, if it found in the Board's favor; to set it aside, if it found against the Board; or to grant enforcement to a portion of the order and deny it as to the

[7] Petitioner, properly, does not rely upon its own petition to have the order of the Board set aside. Its petition was not filed until five days after it had been served with notice of the Board's motion to withdraw, and two days after it had been filed in court. It could not, therefore, operate to defeat the motion already filed. Compare *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 94. A defendant may not defeat a dismissal by filing a cross-bill or counterclaim after the plaintiff has filed his motion to dismiss but before it has been acted on by the court. *Whittel* v. *Roche*, 88 F. (2d) 366, 367 (C. C. A. 9th); *Youtsey* v. *Hoffman*, 108 Fed. 699 (C. C. Ky.); *Tower* v. *Stimpson*, 175 Fed. 130 (C. C. Mass.); *Cowham* v. *McNider*, 261 Fed. 714 (E. D. Mich.).

rest, or modify it before granting enforcement. Section 10 (e), *infra*, pp. 62–64. The answer filed by petitioner did not change that situation in the least. The ultimate conclusions which the court might reach were neither diminished nor enlarged. The prayer in the answer, quoted above, does no more than ask for what petitioner would receive in any event if it were victorious in the Board's proceeding.

The situation, in other words, is the same as that which would exist in an ordinary lawsuit if a defendant were to file a motion to dismiss the bill instead of a general traverse, or if the defendant's answer prayed that the bill be dismissed. The defendant would, it is true, ask for a particular form of relief, but it is precisely the relief to which he would be entitled if he were successful in defending the action. Under such circumstances, it seems to be a plain misuse of the term "affirmative relief" to assert that a demand for a judgment for the defending party—and nothing more—bars a plaintiff from its right to a voluntary dismissal. *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson*, 84 F. (2d) 330, 331 (C. C. A. 4th).

Petitioner devotes considerable space (Br., pp. 30–33) to an attempt to disprove this almost self-evident proposition. It cites no decisions which actually state a contrary doctrine but relies on a number of cases which are alleged to be inconsistent with the Board's contention. The cases, we submit, are entirely consistent with our position. In *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed.

569 (C. C. E. D. Mich.), referred to on p. 31 of petitioner's brief, plaintiff's request to be allowed to dismiss was denied, not because defendant had asked for the same relief as it would have had upon winning plaintiff's action, but because of serious prejudice which would result to the defendant by reason of delay, and because defendant asked for relief above and beyond that which it would have had if it had simply defeated plaintiff's action. See 55 Fed. at 575; *Sauter* v. *First National Bank*, 8 F. (2d) 121, 124 (C. C. A. 7th). Similarly, actual prejudice—loss of defenses or loss due to delay—formed the basis for the decisions in the lien cases cited by petitioner on p. 31 of its brief. *Stevens* v. *The Railroads*, 4 Fed. 97, 101–103 (C. C. W. D. Tenn.), aff'd, 114 U. S. 663; *Callahan* v. *Hicks*, 90 Fed. 539, 543 (C. C. W. D. Va.); *Sauter* v. *First National Bank*, 8 F. (2d) 121, 124 (C. C. A. 7th). And, in the patent cases cited by petitioners at p. 32, the voluntary dismissals were not allowed because defendants had asked for substantially more than that which they would have had by a successful defense in the plaintiffs' cases. *Electrical Accumulator Co.* v. *Brush Electric Co.*, 44 Fed. 602, 603, 605 (C. C. N. D. Ohio); *Hat-Sweat Mfg. Co.* v. *Waring*, 46 Fed. 87 (C. C. S. D. N. Y.); *Automotive Products Corp.* v. *Wolverine Bumper & Specialty Co.*, 15 F. (2d) 745, 747 (C. C. A. 6th), certiorari denied, 275 U. S. 565. In *In re Georgia Power Co.*, 89 F. (2d) 218 (C. C. A. 5th), the defendants had acquired a valuable right by success-

fully opposing a motion for an interlocutory injunction, and on that basis plaintiff's request for permission to dismiss voluntarily was refused. See 89 F. (2d) at p. 220. The unusual facts of this case clearly distinguish it.

Even if petitioner were able successfully to establish that the prayer of its answer was a prayer for "affirmative relief," there still remain two insuperable obstacles to the establishment of its position. In the first place, as petitioner itself recognizes (Br., pp. 29–30), the *Skinner & Eddy* case, *supra,* requires not only that a defendant be entitled to affirmative relief, but also that, having expended time and effort in preparing his counter case, he would be prejudiced by being remitted to another proceeding. Unless there be actual prejudice, a prayer for affirmative relief is immaterial. *City of Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569, 575 (C. C. E. D. Mich.); *Harding* v. *Corn Products Refining Co.,* 168 Fed. 658 (C. C. A. 7th), certiorari denied, 214 U. S. 515; *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson,* 84 F. (2d) 330, 331 (C. C. A. 4th); *Whittel* v. *Roche,* 88 F. (2d) 366, 371 (C. C. A. 9th).

It is highly significant that at no time heretofore has petitioner even so much as suggested that it had been put to any trouble in the preparation of its "affirmative" case. Its memorandum in the court below in opposition to the motion of the Board for leave to withdraw its case (R. 41–50), even in that part of it addressed to the discretion of the court, contains no suggestion that the mo-

tion should be denied upon this ground. The same is true of its motion to vacate the order permitting the Board to withdraw (R. 56). Its petition for certiorari contains no reference to the matter, nor does its Brief in Reply to the Brief in Opposition to the writ of certiorari, in which the deficiencies in petitioner's case were clearly pointed out (p. 11).

Even assuming, however, that petitioner may, as an afterthought, challenge a discretionary act of the court below (see pp. 30–31, *infra*) upon a basis not suggested to that court, we submit that petitioner can make no showing which is adequate to meet the requirement of actual prejudice stated in the *Skinner & Eddy* and other cases cited above. Some of the activity detailed on p. 30 of petitioner's brief is plainly related to the proceeding before the Board, rather than to the proceeding in the Circuit Court of Appeals. Others of its actions were the preparation of interrogatories which were ordered stricken from the record (R. 108). Certainly the showing must be confined to proper activity in the preparation of a case. The remaining activities were simply the ordinary preparation of pleadings, which were obviously patterned largely upon the petition for rehearing and papers already filed with the Board. Certainly the preparation of an answer, for example, cannot constitute actual prejudice, else prejudice would exist in every case. Cf. *Erie R. Co.* v. *Boston, C. C. & N. Y. Canal Co.*, 270 Fed.

876 (Mass.). Nor is the matter dependent, as petitioner seems to believe, on "what more petitioner could have done in order to bring itself within the language of" the *Skinner & Eddy* case (Br., p. 30). The critical question is not whether the petitioner has made every attempt possible to put itself in a position to be prejudiced, but rather whether it has been prejudiced in fact. We believe that, even if the facts set out on p. 30 of its brief be considered, it has not been so prejudiced.

3. We believe, therefore, that petitioner's claims of prejudice are completely without foundation. But we need not rest there. The motion for leave to dismiss was plainly one that the court below could grant or deny in its discretion. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146; *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, 573 (C. C. E. D. Mich.); *Penn Phonograph Co.* v. *Columbia Phonograph Co.*, 132 Fed. 808, 810 (C. C. A. 3d); *United Motors Service* v. *Tropic-Aire*, 57 F. (2d) 479, 488 (C. C. A. 8th); *Pilot Life Ins. Co.* v. *Habis*, 90 F. (2d) 842, 843, 844 (C. C. A. 4th); *Dooley Improvement's Inc.* v. *Motor Improvement's Inc.*, 6 F. Supp. 161, 163 (Del.). Similar power exists to permit appellants, including the United States, to discontinue an appeal over the objection of the appellee. *Latham's & Deming's Appeal*, 9 Wall. 145; *United States* v. *The Minnesota & N. W. R. Co.*, 18 How. 241; *United States* v. *Young*, 94 U. S. 258; *United States* v. *Griffith*, 141 U. S. 212; *United States* v. *Belcher*, 294 U. S. 736.

Although petitioner urged, in opposition to the Board's motion for leave to dismiss, that as a matter of discretion the court below should not allow the voluntary dismissal (R. 45–48), it does not now claim that the court abused its discretion in granting the Board's motion. Indeed, since petitioner did not raise the question in its petition for certiorari, this Court is not called upon to consider the question. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182.

But even were the question an open one, no showing of abuse of discretion could be made. No showing is made, either in the record or in petitioner's brief, of the actual facts with respect to either time or money spent in the activities which it relates. Nothing appears which even in remote degree corresponds to the usual case in which a dismissal has been refused because the defendant would be prejudiced by activity in the presentation of its case. Compare *Western Union Tel. Co.* v. *American Bell Tel. Co.*, 69 Fed. 666 (C. C. A. 1st), certiorari denied, 166 U. S. 721. In many cases in which the defendant could properly assert that he had expended much more time and energy than petitioner has, the plaintiff nevertheless has been allowed to dismiss his action. For example, dismissals have been allowed after defendant had filed testimony, taken depositions, or secured answers to interrogatories. *Connecticut & P. R. R. Co.* v. *Hendee*, 27 Fed. 672 (C. C. Vt.); *Young* v.

J. Samuels & Bro., 232 Fed. 784 (R. I.); *Whitall-Tatum* v. *Corning Glass Works*, 11 F. Supp. 338 (W. D. N. Y.); *Elliott Addressing Machine Co.* v. *New England Tel. & Tel. Co.*, 20 F. Supp. 278 (Mass.). The same result has been reached even after the evidence has been completed. *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.*, 121 Fed. 1015 (C. C. Mass.); *Morton Trust Co.* v. *Keith*, 150 Fed. 606 (C. C. Mass.). Cf. *E. G. Staude Mfg. Co.* v. *Labombarde*, 229 Fed. 1004 (N. H.), modified, 243 Fed. 962 (C. C. A. 1st). And dismissals have been allowed after the defendant has won the denial of a preliminary injunction, *Penn Phonograph Co.* v. *Columbia Phonograph Co.*, 132 Fed. 806 (C. C. A. 3d); *Orr* v. *Coca-Cola Co.*, 247 Fed. 452 (C. C. A. 9th), even where the defendant had been forced to take an appeal in order to have the appellate court reverse an order granting the preliminary injunction. *Thomson-Houston Electric Co.* v. *Holland*, 160 Fed. 768 (C. C. N. D. Ohio).

Finally the policy of avoiding needless litigation, which was invoked by the Board in support of its motion, and which has been stated and elaborated above, clearly support the conclusion of the court. The question was fully presented, and the determination of the court below, no abuse of discretion having been shown, will be accepted.[1]

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[1] The same answer is applicable to petitioner's further contention that it will be prejudiced in its relation with third persons. The contention was not presented to the court

C. THE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT DO NOT REQUIRE A CONTRARY CONCLUSION

Petitioner's final contention is based upon its construction of Section 10 (e) of the Act, *infra*, pp. 62–64, which it construes as requiring a Circuit Court of Appeals to proceed to a decree affirming, modifying, or setting aside the order once its jurisdiction attaches.

The Act, of course, does not so state. Section 10 (e) says only that a court "shall have power" to enter a decree, not that it *must* do so. It has been pointed out in the Brief in Opposition to the petition for certiorari (p. 12) that the contention leads to the absurd conclusion that the court *must* proceed to a conclusion in a case even though *neither* party so desired. Yet no attempt is made in petitioner's brief to explain why such a construction of the statute should be adopted. Joint petitions to dismiss petitions for enforcement under the analogous Federal Trade Commission Act have been granted. *E. g.*, *Federal Trade Commission* v.

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below, and should not now be considered as a valid objection to the exercise of the discretion by the lower court. See *Duplex Printing Press Co.* v. *Campbell Printing-Press Co.*, 69 Fed. 250, 252 (C. C. A. 6th). It is, moreover, entirely speculative unlike the patent cases relied on by petition (Br., pp. 35–36). Finally, the fact that even in criminal cases the Government may voluntarily discontinue a prosecution, notwithstanding the contention of the defendant that he should be absolved, indicates that the consideration to which petitioner adverts is not a particularly weighty one. See *United States* v. *Brooks*, 44 Fed. 949 (N. D. Wash); *United States* v. *Harned*, 44 Fed. 751 (N. D. Wash.).

Evans Fur Co. and Kent Fur Co., January 4, 1937 (C. C. A. 2d); *Federal Trade Commission* v. *George H. Lee Co.*, April 10, 1935 (C. C. A. 8th); *Federal Trade Commission* v. *L. A. Crancer & G. B. Fleischman*, March 20, 1935 (C. C. A. 8th). The concept of a judicial juggernaut which, once started, cannot be stopped by either party or by both together is so contrary to all reason that it would certainly require the clearest language to justify such a result.

Indeed, petitioner's whole argument on the statute seems to confuse the presence of jurisdiction with its exercise. Its long discussion of the provision that jurisdiction of the proceeding is in the Board "until" a record is filed in the Circuit Court of Appeals, when the jurisdiction of the Board ceases and that of the court becomes exclusive (Br., pp. 17–21) can have no relevance whatever unless one assumes that the court, once having acquired jurisdiction, cannot allow the proceeding to be dismissed. There is no doubt that jurisdiction attached in the court below in this case, but the existence of jurisdiction does no more to prevent a voluntary dismissal in a proceeding to review an order of the Board than it does in every other case in which a proceeding is dismissed after it is within the jurisdiction of a court.

Petitioner attempts (Br., pp. 23–27) to develop alleged reasons of policy in favor of its interpretation of Section 10 (e) and against that adopted by

the court below. The reasons it suggests are wholly out of place. This Court will not accept an argument which impugns the good faith of an administrative agency by suggesting that the valid and proper reasons advanced by the Board in its motion for leave to withdraw after the decision of this Court in the *Morgan* case (R. 36-38) were simply a cloak for other and improper ones. Legally, of course, petitioner's reference to the reasons for the voluntary dismissal of a case are totally irrelevant. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 20; *Harding* v. *Corn Products Refining Co.*, 168 Fed. 658, 665 (C. C. A. 7th), certiorari denied, 214 U. S. 515; *Prudential Insurance Co. of America* v. *Stack*, 60 F. (2d) 830, 832 (C. C. A. 4th). See also *United States* v. *Griffith*, 141 U. S. 212. But we need not rely upon that. The Board has at all times fully informed the court as to its reasons—reasons based simply upon a desire to eliminate, so far as possible, the necessity of a long litigation on issues not going to the merits, and to afford petitioner further opportunities before the Board. Petitioner, it seems, might well have welcomed, rather than criticised, the Board's expressed desire to accord to petitioner precisely that which it so strenuously desired before the Board's motion was filed.

Equally questionable is petitioner's attempt to

conjure up hypothetical abuses which might be committed by the Board. Again, the argument is legally without relevance, since the Court will not speculate as to the validity of the further proceedings to be had before the Board, nor will it assume that they will be irregular in any respect. *In re Petition of National Labor Relations Board, supra; Dalton Adding Machine Co.* v. *Virginia*, 236 U. S. 699, 701; *Lehmann* v. *State Board of Public Accountancy*, 263 U. S. 394, 398. Again, however, it is unnecessary to rely upon that principle. Petitioner's suggestions have not the slightest foundation in fact. No scintilla of evidence is referred to that justifies the assumption that any one of the situations created by petitioner's imagination is possible, much less likely. An argument built upon such completely groundless hypotheses does not merit even serious consideration.

We submit, therefore, that the order of May 5, 1938, allowing the Board voluntarily to dismiss its petition for enforcement of its order, was correct, and should be affirmed.

II

No. 183

THE COURT BELOW WAS WITHOUT JURISDICTION OF THE CAUSE IN PETITIONER'S CASE, AND ITS ORDER REMANDING THE CAUSE TO THE BOARD SHOULD BE REVERSED UPON THAT GROUND

The order of the court below under review in this case (No. 183, No. 8019 below) is the order of June

10, 1938 (R. 106), remanding the cause to the Board for the purpose of setting aside the Board's order and taking further proceedings. In Point III, *infra*, we shall show that if the court below had jurisdiction to make the order, it was valid and should be affirmed. In the present point, we will urge that the court was without jurisdiction to make the order, and that it should therefore be reversed, and the case remanded to the court below with directions to dismiss the petition for lack of jurisdiction.

The question of jurisdiction was directly raised in the court below by the motion of the Board of June 2, 1938 (R. 85–89) to vacate the order of May 9, 1938 (R. 80), in which the court below ordered that the transcript of record which had been filed in the Board's case be deemed to have been filed in petitioner's case as of May 4, 1938. The Board sought to have the cause remanded only in the event that its motion to vacate was denied (R. 105). The question was also raised in the Board's Brief in Opposition to the petition for certiorari, pp. 13–14. As we there stated (p. 14), the Board did not file a cross-petition for certiorari because the granting of its motion to remand had the same practical result as the granting of its motion to vacate would have had—it permitted the Board to set aside its order and take further proceedings. In any event, the question being one of compliance with specific statutory jurisdictional provisions, the Board could

not waive the issue, and necessarily it is before the Court. *United States* v. *Corrick*, 298 U. S. 435, 440; *United States* v. *Griffin*, 303 U. S. 226, 229.

There are several jurisdictional requirements contained in Section 10 (f), *infra*, p. 64, which were not met in petitioner's case and which make it impossible for the court below to enter its order of May 9, 1938. The first of these prerequisites is that which requires that a petition for review be filed by a "person aggrieved" by the order of the Board. The circumstances under which petitioner's petition for review was filed show clearly that petitioner cannot be so described.

Petitioner's petition for rehearing before the Board, and its answer to the Board's petition for enforcement, complained of the absence of a trial examiner's report and an oral argument and prayed that the order of the Board be set aside (R. 9, 21). Thereafter the Board announced, by its notice to petitioner, that it would move to dismiss its own proceeding, that it would voluntarily grant that which petitioner sought—the setting aside of the order, and that it would have the further proceedings which petitioner contended should have been held, and by which other errors of which petitioner complained would be corrected if found to be meritorious.

Petitioner's petition for review, filed on May 4, 1938 (R. 62), five days after it had been served with

notice of the Board's motion for leave to withdraw (R. 35), was, therefore, only a tactical maneuver by which petitioner hoped to defeat or delay the action of the Board in granting to petitioner that which it had previously asked for. Obviously, it did not represent the act of a "person aggrieved" by the order. Congress intended that petitions for review should be used to contest alleged denials of substantial rights. It did not intend them to be used for simply tactical purposes. The decision in *In re Petition of National Labor Relations Board, supra,* is directly in point. The Court there stated:

> Counsel insist that Republic is aggrieved, within the meaning of subsection (f), by the Board's attempt to retain jurisdiction of the proceeding and take further steps in it. But the Act grants a review and relief only to a person aggrieved by an order of the Board and had the court not restrained the Board its order would have been vacated and there now would be no order outstanding.

Similarly, here, if the court had not entertained the petition for review, and made its order of May 9, the Board's order would have been set aside pursuant to its notice of May 6, unless petitioner itself had shown good cause to the contrary (R. 54).

Apart from the fact that petitioner was not aggrieved within the meaning of the Act, there is a second jurisdictional requirement which has not been met. Under the specific requirements of Sec-

tion 10 (f) jurisdiction does not attach upon a petition for review until, after the petition has been filed in court and a copy thereof served on the Board, "the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board," and the court shall cause notice thereof to be served on the Board. These last requirements were not fulfilled.

We may agree with petitioner (Br., pp. 76–81) that Section 10 (f) should not be interpreted to require a duplication of physical transcripts when one is already on file pursuant to a petition to enforce or review the same order of the Board.* But under Section 10 (f), even if a transcript is already on file, more than the mere filing of a petition to review is required to vest the court with jurisdiction. See *In re Petition of National Labor Relations Board, supra.* The section contemplates at least an order consolidating the cases, or deeming the transcript on file in the first case filed in the second. Petitioner's motions for such orders (R. 38, 77) were a recognition of this necessity, as was its statement to the court (R. 50):

> The Act further requires, however, that upon the filing of such a petition a transcript of the entire record before the Board be filed.

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* The device of intervention in the Circuit Court of Appeals would serve to eliminate any questions with respect to duplicate records. Cf. *National Labor Relations Board v. Remington Rand, Inc., and Central Executive Council*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, Nos. 970, 1058, May 23, 31, 1938.

> This transcript must be certified by the Board. Such certified transcript is now on file in this court. The respondent as petitioner in its own suit has asked that it be deemed filed in that case.

The order deeming the record filed was not, however, granted until May 9, 1938 (R. 80). At that time, we submit, the court was without jurisdiction to make any such order. On May 5, 1938, the Board had received a copy of the court's order (R. 51), signed and sealed by the clerk of the court, granting the Board's motion for leave to withdraw its petition for enforcement and the certified copy of the record (R. 51). On May 6, 1938, the Board, pursuant to the leave thus granted, had reasserted its own jurisdiction, and served petitioner with a notice of further proceedings before it (R. 54). The jurisdiction of the court came to an end at that point. The order of May 5, followed by the Board's action of May 6, like the dismissal of an appeal, "ended the case in that court, and deprived it of all power to add to or alter the record as certified." *Realty Acceptance Corp. v. Montgomery*, 284 U. S. 547, 552.

This Court has specifically held that once a court has divested itself of jurisdiction, and, pursuant thereto, jurisdiction has vested in and been exercised by a lower or other court, the first court cannot, by a reconsideration of its decision, revest jurisdiction in itself. In *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, the Court of Claims had granted a plaintiff's motion to dismiss its suit. The plain-

tiff thereupon filed a new suit involving the same claim in a district court in Washington. Thereafter, upon motion of the United States, the Court of Claims vacated its order of dismissal, and granted leave to the United States to file a counterclaim. This Court, pointing out that under Section 154 of the Judicial Code, no suit could be maintained in the Court of Claims if a similar suit was pending in another court, reversed the order, stating (265 U. S. at p. 95):

> The jurisdiction of these claims by the Court of Claims having been parted with by the order of dismissal in April can not be resumed by a retroactive order of the subsequent November, in view of the restrictive provision of § 154, which, by reason of the Washington suit, intervene and apply. * * *

The decision is precisely applicable to the present situation, and is, we submit, conclusive.

Further authority upon the question is contained in the opinions relating to attempts by federal District Courts to vacate orders remanding cases to a state court. The decisions uniformly hold that once the cause has been remanded and the state court has had further proceedings pursuant to the remand, as the Board did by its notice of May 6, the federal court is powerless to vacate its former order. *Ausbrooks* v. *Western Union Telegraph Co.*, 282 Fed. 733 (M. D. Tenn.); *Empire Mining Co.* v. *Propeller Tow-Boat Co.*, 59 S. C. 549, s. c., 108 Fed. 900 (C. C. S. C.); cf. *Traveller's Protec-*

tive Ass'n v. *Smith*, 71 F. (2d) 511, 513 (C. C. A. 4th).

Petitioner is not helped by the statement in the order of May 9 that the record in the Board's case was to be deemed to have been filed in petitioner's case "as of the time of the filing * * * by petitioner of its petition to review" (R. 80). The provision may have been inadvertent (see R. 88), but, in any event, it does not touch the question whether the court had power on May 9 to make any order at all. Certainly the court could not, by a retroactive order, divest the Board of the jurisdiction which it had regained and exercised pursuant to the order of May 5. *Ex parte Skinner & Eddy Corp., supra.*

Nor can petitioner avoid this conclusion by contending that the court acquired jurisdiction on May 4 apart from the order of May 9. The argument is that the order of May 9 "was merely confirmatory of the legal effect of the filing of the petition" (Br., p. 78). We have shown above, pp. 39–40, that Section 10 (f) requires more than the mere filing of a petition to give the court jurisdiction, as this Court has held and as petitioner itself has previously admitted. The general provisions in the Judicial Code with respect to the use of one record in related appeals to this Court and to the Circuit Courts of Appeals (U. S. C., Title 28, Sec. 864) upon which petitioner relies (Br., pp. 79–81) certainly cannot control the specific provision of the Act to the contrary.

There is also a third jurisdictional prerequisite which is lacking, which defeats the jurisdiction of the court even if the order of May 9 did effect a filing in petitioner's case of the record then in the court below. Section 10 (e) and (f) specifically require that the transcript of record which must be filed in order to vest jurisdiction in the Court be a transcript of the "entire" record. In view of the notice of May 6, 1938, the record which had theretofore been filed in the Board's case was no longer the "entire" record—it did not, in the language of this Court, exhibit "the Board's final action." *In re Petition of National Labor Relations Board, supra.* Consequently, no matter what effect be given to the attempt by the petitioner and the court below to effect a transfer of the record then in the court from the Board's case to petitioner's case, the attempt was of necessity completely ineffective.

We submit, therefore, that the court never had jurisdiction of petitioner's case, and that, accordingly, the court's order of June 10, remanding the case to the Board, should be reversed with instructions to dismiss the petition for review for lack of jurisdiction.[10]

[10] In the event that the Court is of opinion that the court below did not have jurisdiction, but that the point cannot be urged in this Court by the Board as a ground of a reversal of the order of June 10, the Court should affirm the order on the ground that it reached the correct result, without passing on the questions raised in Point III, *infra*. *Arthur C. Harvey & Co.* v. *Malley*, 288 U. S. 415.

III

No. 183

IF THE COURT BELOW HAD JURISDICTION, IT PROPERLY REMANDED THE CASE TO THE BOARD

If the court below had acquired jurisdiction of the cause by reason of petitioner's petition for review, its decision was correct, and its order entered on June 10, 1938 (R. 108), remanding the case to the Board for the purpose of setting aside its findings and order and having further proceedings, should be affirmed.

Petitioner's first objection to the order is that the Circuit Court of Appeals had no power to make it. The objection is in the alternative: that there is no power in a Circuit Court of Appeals to remand a cause to an administrative tribunal; and that if there be such a power, it does not exist in the present case, because it would be inconsistent with the provisions of Section 10 of the Act. Petitioner's second objection to the order, which seems to confuse with, or condition the existence of, the *power* to remand with the *mode of exercise* of that power, is that the court below had no power to remand the case without first deciding it. The two questions are much more conveniently treated separately. Accordingly, we shall show (A) that the court below clearly possessed the power to order the remand to the Board, and (B) that the power was properly exercised in the present case.

A. THE CIRCUIT COURT OF APPEALS HAD THE POWER TO REMAND THE CASE TO THE BOARD FOR FURTHER PROCEEDINGS THERE

The existence of an inherent power in the Circuit Court of Appeals to remand a cause pending before it to the Board is amply confirmed by many cases. Decisions under the Federal Trade Commission Act, which is very similar to the National Labor Relations Act with respect to judicial review of administrative orders,[11] are directly in point. In many cases arising under that Act this Court and the Circuit Courts of Appeals have recognized or exercised their power to remand actions to the Commission for further proceedings. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 580, 583; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 297; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47 (C. C. A. 6th), certiorari denied, 273 U. S. 717, 718; *Ohio Leather Co.* v.

[11] Section 5 of the Federal Trade Commission Act, like Section 10 (e) of the National Labor Relations Act, provides that upon the filing by the Commission of a petition to enforce its order, together with a transcript of the record, the court "shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission." Act of September 26, 1914, c. 311, 38 Stat. 719, U. S. C., Title 15, Sec. 45. Each Act also contains a provision under which the court, upon application by either party, may order additional evidence to be taken before the administrative tribunal. Neither Act contains any specific provision for remand.

Federal Trade Commission, 45 F. (2d) 39 (C. C. A. 6th); cf. *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, 621, 622 (C. C. A. 2d), certiorari denied, 277 U. S. 598. See also *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.).

The same inherent power to remand has long been recognized with respect to the review of orders of the Interstate Commerce Commission. Although the Commerce Act contains no provision for remand, this Court stated in *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 239, that if—

> the Commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court * * * should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in.

See also 162 U. S. at p. 238; *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302. And in several cases in the Circuit Courts of Appeals this power to remand has been exercised under the National Labor Relations Act itself. *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 155 (C. C. A. 5th); *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th); *Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. (2d) 959, 964 (C. C. A. 4th);

North Whittier Heights Citrus Ass'n v. *National Labor Relations Board*, 97 F. (2d) 1010 (C. C. A. 9th), pending on petition for writ of certiorari, No. 340, present Term. Indeed petitioner's own view on this question apparently has only recently changed, since in its answer in the court below it specifically requested that "the proceeding [be] remanded to the Board with directions * * *" (R. 21).

These cases are also a complete answer to petitioner's totally unsupported contention that in the absence of express statutory authorization a proceeding may not properly be remanded to an administrative tribunal (Br., pp. 46–48). It seems wholly unnecessary to quibble with petitioner on whether, under the explanation of the word "remand" contained in *Federal Radio Commission* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266, 278, the numerous decisions cited above have misused the term in directing that a case be returned to an administrative board or commission for further proceedings. At least, the word is commonly so used, its meaning is plain, and, as the cases show, the power of the courts to take that action when dealing with orders of administrative tribunals, whatever it may be called, is too well settled even to be open to question.

Petitioner also urges (Br., pp. 40, 42, 57) that even if there is an inherent power to remand a case to an administrative tribunal, it is inconsistent with the intention of Congress with respect to the judi-

cial review of orders of the Board as set out in Section 10. As proof of the alleged Congressional intent, petitioner refers to the provisions of Section 10 (d) and (e), *infra*, pp. 62–64, terminating the jurisdiction of the Board and giving the Circuit Court of Appeals exclusive jurisdiction of the case upon the filing of a transcript of the record; the provision of Section 10 (f), *infra*, p. 64, conferring upon a "person aggrieved" a right to obtain judicial review of an order; and that part of Section 10 (e) which allows the court to order the taking of additional testimony upon request of either party (Br., pp. 42, 57).

We fail to see in these provisions any evidence of a Congressional intent to negative the existence of an inherent power to remand which would otherwise exist. Subsections (d), (e) and (f) are in no degree inconsistent unless one first assumes that which petitioner is trying to prove—that the court, once having assumed jurisdiction, *must* proceed to a decision. That argument, as we have shown above, pp. 32–35, is plainly without merit. Nor do the provisions of Section 10 (e) with respect to the taking of additional testimony evince a contrary intent. The provision simply provides a means by which Congress hoped to facilitate final decisions by the court, and is in no way inconsistent with the continued existence of other powers in the courts which may also help to achieve that end, and which would not be dependent upon an appli-

cation to the court by a party as would be necessary under Section 10 (e). It is much more reasonable to assume that had Congress intended that the inherent power to remand should not exist in proceedings of this sort, it would have expressly negatived it, which, admittedly, it did not do. *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 336; *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 231.

The complete answer to the contention, however, is supplied by the Federal Trade Commission cases cited above, pp. 45–46. Section 5 of that Act, in providing for judicial review of orders of the Commission, contains provisions for vesting jurisdiction in the courts upon the filing of a transcript, and for further hearings upon the application of either party, nearly identical with those in Section 10 of the National Labor Relations Act (see footnote 11, p. 45, *supra*). Yet in none of the cases arising under that Act in which the Court has remanded cases to the Commission has it even been intimated that the inherent power of a court to remand a proceeding to the Federal Trade Commission conflicted with the provisions of the statute.

We submit, therefore, that in a proceeding to review an order of the National Labor Relations Board there can be no doubt that the Circuit Courts of Appeals have an inherent power to remand the cause to the Board for further proceedings.

B. THE POWER TO REMAND WAS PROPERLY EXERCISED IN THE PRESENT CASE

Petitioner also contends (Br., pp. 46, *et seq.*) that even if the court below had the power to send the case back to the Board, the manner in which the power was exercised was improper. The argument is that the Circuit Court of Appeals should have set aside the order of the Board before the remand. Such a contention, we submit, is both pointless and without merit. So far as petitioner is concerned, whether the order was set aside by the court upon the remand is of no consequence whatever. In any event, the court's action was entirely proper.

1. *Whether or not the order was set aside before the remand is of no consequence*

Petitioner devotes a surprising amount of space (Br., pp. 46–74) to its argument that if the court had the power to remand the case, it should have first set aside the Board's order. It is plain that, at best, the argument relates simply to a question of procedural technique which could be decided either way without any practical consequences whatever. In essence, the argument is that the court should have set aside the order, rather than remanding it so that the Board could set it aside. In either case, however, the order is set aside, which is what petitioner wishes. If, as provided by the order of the court below, the cause is remanded and the order then set aside by the Board, there is, of course, no

bar to further proceedings which might eventually result in the entry of a new order. But if the order had been set aside by the court, there would likewise have been no obstacle to further proceedings by the Board. See cases cited at pp. 22–23, *supra*.

This is certainly true if petitioner is contending that there should have been a formal order of reversal—that is, one not based on any consideration of the questions raised by petitioner's petition. It is equally true, however, of the contention that the court should have decided all of the procedural questions raised by petitioner and remanded the case only if it found that petitioner's contentions were valid. The fact which cannot be avoided is that the order will be set aside by the Board—and petitioner could have achieved no more if the procedural issues had been decided and it had been successful. Nor are any defenses which it now has, and which it may wish to raise if and when a new order is entered, lost to it or prejudiced in any way. And, in the meantime, the objective which it had sought to achieve by its petition to review—that the order be set aside—is completely accomplished.

2. *In any event, the court below, in its discretion, could remand the case to the Board without setting aside the order*

Even assuming, however, that it were of practical consequence that the court below did not set aside the Board's order, we submit that the court was clearly empowered, in its discretion, to exercise its

power to remand the case to the Board without first setting aside the order, either formally, or for error found.

It has never been held that a Circuit Court of Appeals, in remanding a case to an administrative tribunal whose orders are not self-enforcing, must first either enter a formal reversal of the order of that tribunal or else determine the validity of the order and set it aside if it is found to be invalid for any reason. On the contrary, the action of the court below is in accord with the dispositions made *sua sponte* by the Circuit Courts of Appeals for the Fourth and Fifth Circuits in *Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. (2d) 959, 964 (C. C. A. 4th), and *Aguilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 155 (C. C. A. 5th), and *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th), respectively, as well as with that made by the Circuit Court of Appeals for the Ninth Circuit upon the Board's motion in *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 97 F. (2d) 1010, pending on petition for certiorari, No. 340, present Term.[13]

[13] Although in the *Mooresville* case the Circuit Court of Appeals previously had issued a decree modifying the Board's order and enforcing it as modified (94 F. (2d) 61). But this decree was set aside and annulled by the court on April 4, 1938, in granting the Board's petition for rehearing. Consequently, on July 13, 1938, when the court, pursuant to its decision reported in 97 F. (2d) 959, ordered that the "case be remanded" to permit the Board to determine the question of substantially equivalent employment, the Board's order stood undisturbed.

In addition, there are several situations in which the Federal courts, including this Court, have remanded cases without reversing the decree or order below and without deciding the issues. Perhaps the closest analogy to the instant case is where the appellate court, without disturbing the decree of the lower court, grants the request of the lower court to return the record so that further proceedings or a rehearing may be had below. *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902 (C. C. A. 2d), reversed on other grounds, 274 U. S. 316; *Cimiotti Unhairing Co.* v. *American Unhairing Mach. Co.*, 99 Fed. 1003 (C. C. A. 2d), on rehearing below, 108 Fed. 82 (C. C. S. D. N. Y.); *Sundh Electric Co.* v. *General Electric Co.*, 244 Fed. 163, 171 (C. C. A. 2d), certiorari denied, 245 U. S. 661. This Court has indicated that such action is entirely proper provided the term of the lower court had not expired.[18] *Roemer* v. *Simon*, 91 U. S. 149; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547. See also *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10th). Even without such an application by the lower court, an appellate court may remand to the lower court for further proceedings yet not reverse the appealed order or judgment. *Ballard* v. *Searls*, 130 U. S. 50; *Malleable Iron Range Co.* v. *United States*, 273 U. S.

[18] If the term of the lower court had expired, a formal reversal would have been necessary, prior to the recent adoption of the Rules of Civil Procedure for the District Courts of the United States (Rule 6 (c)), to allow the lower court to take further action in the cause. (See pp. 57–59, *infra*.)

674. See also *Jensen* v. *New York Life Ins. Co.*, 50 F. (2d) 512 (C. C. A. 8th), certiorari denied, 287 U. S. 626.

The application of a special master for a withdrawal and return of his report after filing, so that he might reconsider it, presents another close analogy to the motion of the Board, as this Court has suggested. *In re Petition of National Labor Relations Board, supra.* As in the present case, no purpose would be served by a setting aside, and plainly the court may grant the master's application without setting aside his report. *National Folding-Box & Paper Co.* v. *Dayton Paper-Novelty Co.*, 91 Fed. 822 (C. C. S. D. Ohio). The same is true where the court grants a motion by one of the parties to recommit the report for further proceedings (*Westlake* v. *Marrin*, 176 Fed. 742 (C. C. E. D. Pa.); *Ball Engineering Co.* v. *J. G. White, Inc.*, 283 Fed. 496 (Conn.)), or where the court recommits the report *sua sponte*. *Missouri Pac. R. Co.* v. *Texas & P. Ry. Co.*, 33 Fed. 359 (C. C. E. D. La.); *Kansas Loan & Trust Co.* v. *Electric Ry., Light & Power Co.*, 108 Fed. 702 (C. C. W. D. Mo.).

The remands in these cases were not to administrative tribunals, but no reason appears why the inherent powers which courts possess in these situations may not be exercised equally well when orders of administrative tribunals are in question. Cf. *Podlesak* v. *McInnerney*, 26 App. D. C. 399. In fact the contrary is true. Simple, effective, and

rapid court review of orders of administrative tribunals depends in large part in allowing courts to exercise familiar procedural judicial powers which serve to expedite or avoid litigation and which are not repugnant to the statutory scheme.

Petitioner contends (Br., pp. 58–69) that we state the principles of these decisions too broadly. The objection is based upon a misapprehension. We do not contend, as petitioner seems to assume, that the cases cited are directly in point; we submit, rather, that they disprove petitioner's flat statement that a court can *never* remand a case without first setting aside the order of the court or the administrative tribunal (Br. pp. 48–49), and that they are analogies which, while still analogies, indicate that the courts are able to take such action as will facilitate the prompt and effective discharge of their functions and at the same time will avoid useless litigation on questions which are no longer in issue.

Petitioner also misapprehends the nature of the power which was exercised. The power is not, as petitioner states (Br., p. 55), a power in the *Board* "to halt the processes of judicial review whenever it decides that it would like to take further proceedings in the case." The power is clearly in the *court*, and is, of course, discretionary. All that we assert is that the court *may* remand a proceeding to the Board without first setting aside its order if it believes that in that way it can expedite the

proceedings and avoid the decision of questions which it may not be necessary for it to decide.

The same misapprehension has led petitioner to again conjure up a series of hypothetical cases in which it asserts that the power would lead to abuses by the Board. Plainly, however, the Board is subject to the discretion of the court, and it cannot be assumed that that discretion will be improvidently exercised.

Certainly there is no compulsion on a court, before remanding, to decide the issues on the record presented. Indeed, this Court has declared that it is "not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, at 314; *United States and Interstate Commerce Commission* v. *Alaska Steamship Co.*, 253 U. S. 113, 116. The Court's established practice where all the issues are moot is to reverse the decree without determining whether it was valid, even though full argument and consideration have been had, only so that it would not be left in force, and to remand the cause with directions to dismiss the bill. *United States* v. *Anchor Coal Co.*, 279 U. S. 812, and cases collected at p. 813.

Many other instances may be listed in which this Court in the exercise of its appellate jurisdiction

has declined to decide the issues but has entered purely formal reversals and has remanded the causes for further proceedings. Such disposition has been made where the record was insufficient (*Estho* v. *Lear*, 7 Pet. 130; *Levy* v. *Arredondo*, 12 Pet. 218; *Villa* v. *Van Schaick*, 299 U. S. 152) or the evidence inadequate (*United States* v. *Rio Grande Dam and Irrigation Co.*, 184 U. S. 416); where a wrong rule of law was applied below (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202); and where further findings were desired (*Lincoln Gas and Electric Light Co.* v. *City of Lincoln*, 223 U. S. 349) or where the findings were required to be in the form prescribed by the applicable equity rule. *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55. In one case the Court, without determining the issues, reversed the judgment and remanded the cause to permit the state court to reconsider its action in the light of a supervening decision by this Court. *Patterson* v. *Alabama*, 294 U. S. 600, 607. Although the merits are not determined in these instances, formal reversals are entered in order to leave the lower court free to act, though its term has expired, and in order to prevent possibly erroneous decrees of the lower court from being enforced or becoming final by virtue of the expiration of the time to appeal. See *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 509;

Missouri v. *Public Service Commission*, 273 U. S. 126, 131; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Villa* v. *Van Schaick*, 299 U. S. 152, 155, 156; *International Ladies' Garment Workers' Union* v. *Donnelley Garment Co.*, 304 U. S. 243, 251–2; *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, 903 (C. C. A. 2nd), reversed on other grounds, 274 U. S. 316. In the instant case, however, a reversal would have served no such purpose, since the Board has no term and since the Act specifies no time within which a petition to enforce or review an order of the Board must be made.

Petitioner relies upon *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, as showing that an appellate court may not remand a case even to an inferior court without first setting aside the decree. (Br., p. 49). Plainly, the decision does not support the contention. In that case the term of the District Court had expired[14] (299 U. S. 263, 265), leaving it powerless to reopen its decree, and rendering the Circuit Court of Appeals powerless to bestow any authority upon the District Court to change its decree unless a vacatur was entered. *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S.

[14] The record in that case reveals that the final decree of the District Court was entered on August 26, 1935 (R. 494). The term of the court expired on September 9, 1935 (R. 595). The motion to remand was not made until December 4, 1935, and the order remanding the cause was entered on December 5, 1935 (R. 536). The District Court found as a fact, and it was not disputed by either side, that no motion was made to it until after the end of its term (R. 595).

547; *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1, 5; *United States* v. *Mayer*, 235 U. S. 55, 67; *Sibbald* v. *United States*, 12 Pet. 488, 492.[15] The only question was whether the ambiguous order of the Circuit Court of Appeals was to be construed as containing a reversal. The merits were not considered.

The reasons which required a vacatur of the order of the District Court in the *Duke* case thus have no application here. The Board has no term, and no particular form of order by the Circuit Court of Appeals was necessary to enable the Board to take the further proceeding which it wished. The case having been remanded to it, the Board could, upon reasonable notice, set aside its order in whole or in part. Probably it would have the power to do so even in the absence of the specific statutory grant of power contained in Section 10 (d), *infra*, p. 62. Cf. *Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 225.

Petitioner also points out (Br., pp. 50–57) that in some of the cases involving review of orders of the Federal Trade Commission or other administrative agencies, reversals were ordered in connection with the remand. In none of the cases, however, has it ever been held that a reversal is necessary. Nor, we submit, should it be. To argue as

[15] The only exception is with respect to a continuing injunction. *United States* v. *Swift & Co.*, 286 U. S. 106, 114; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182, 184 (C. C. A. 2d), certiorari denied, 278 U. S. 623.

petitioner does is to argue that a court must take upon itself the burden of deciding questions which further administrative proceedings may render moot. The contention not only imposes a completely unnecessary rigidity upon the procedure of court review of administrative orders, but runs counter to the well settled policy that a court will not itself attempt to decide issues where they may be determined by further administrative proceedings. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; *United States* v. *Illinois Central R. R. Co.*, 291 U. S. 457, 463; *Utley* v. *St. Petersburg*, 292 U. S. 106, 109–110. The present case serves as an admirable illustration of the desirability of the existence of the power to remand without a setting aside of the order.

We submit, therefore, that if the court had jurisdiction of the cause by reason of petitioner's petition to review, its order was correct, and should be affirmed.

CONCLUSION

The order of the court below in No. 182 was correct and should be affirmed. The order of the court below in No. 183 should be reversed on the ground that the court was without jurisdiction to enter it, and the cause should be remanded with instructions to dismiss the petition for lack of jurisdiction. If,

however, the court had jurisdiction to enter the order, its decision was correct and it should be affirmed.

Respectfully submitted.

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DECEMBER, 1938.

APPENDIX A

Paragraphs (d), (e), and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. III, Secs. 151–166) provide as follows:

> (d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.
>
> (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the

United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

CHRONOLOGICAL STATEMENT

December 22, 1937: Order entered against petitioner by the Board (R. 3).

January 3, 1938: Petition for rehearing filed with the Board (R. 21–31).

January 7, 1938: Board filed petition in No. 182, accompanied by a transcript (R. 1, 6).

January 10, 1938: Board filed supplemental transcript of record to include petitioner's return to the Board's decision and order (R. 8).

April 11, 1938: Petitioner filed its answer to the Board's petition for enforcement (R. 9–34).

April 25, 1938: This Court decided *Morgan* v. *United States*, 304 U. S. 1.

April 29, 1938: Board served upon petitioner's counsel a notice of motion for leave to withdraw its petition for enforcement (R. 35).

May 2, 1938: Notice of motion and motion for leave to withdraw petition for enforcement filed in the Circuit Court of Appeals for the Sixth Circuit (R. 35, 36).

May 4, 1938: Petitioners filed their petition for review of the order of the Board (R. 62).

May 3 (4?), 1938: Petitioner serves upon Board a notice of motion to consolidate causes (R. 38).

May 4, 1938: Notice of motion and motion by petitioner to consolidate the petition of the Board for enforcement and petition of the petitioner for review filed in court (R. 38, 39). The mo-

tion also requested that the court direct that the transcript of record filed in the Board's case be deemed to be filed in the consolidated cause (R. 41).

May 5, 1938: Petitioner filed memorandum in opposition to motion of the Board for leave to withdraw its petition without prejudice and to withdraw the transcript of record (R. 41).

Court entered order granting Board's motion of May 2 (R. 51).

Petitioner served Board with notice of motion to compel the Board to certify a transcript of record and for further relief (R. 77).

Petitioner filed notice of motion and motion to compel the Board to certify a transcript of the record and for an injunction against any further action by the Board or any of its agents until five days after the record had been furnished to petitioner (R. 77, 78).

May 6, 1938: Board served notice on petitioner that unless sufficient cause to the contrary be shown, the Board would, on May 10, 1938, vacate and set aside its findings and order (R. 54).

May 9, 1938: Board filed opposition to petitioner's motions of May 4 and 5 (R. 51).

Order entered by the court amending its order of May 5, 1938, insofar as it permits the withdrawal of the certified transcript of record and ordering that the certified transcript remain in the files of the court (R. 54).

Order entered by the court that a certified transcript of the record in the Board's case be deemed forthwith to have been filed in petitioner's case as of the time of the filing in this

court by petitioner of its petition to review (R. 80).

May 10, 1938: Petitioner objects that by reason of the pendency of the petition to review the Board was without jurisdiction to proceed pursuant to its notice of May 6. The Board holds its action under advisement (R. 87).

May 19, 1938: Notice of motion and motion filed by the petitioner for leave to amend its petition for review (R. 81).

May 23, 1938: Board files opposition to motion for leave to amend petition (R. 83).

May 31, 1938: Supreme Court decides *In re Petition of National Labor Relations Board,* No. 21, Original, October Term, 1937 (Reprinted R. 90–102).

June 1, 1938: Notice of motion filed by the Board to vacate the order of May 9 directing that the certified transcript of the record filed in the Board's case be deemed filed in the petitioner's case (R. 85).

June 2, 1938: Motion filed by the Board pursuant to notice of motion filed on June 1 (R. 85).

Board withdraws the petition for enforcement pursuant to the order of May 5, 1938 (R. 55).

Board filed notice of motion and motion in petitioner's case to remand it to the Board, conditioned on the court's denial of the Board's motion filed on June 2 to vacate the court's order of May 9 (R. 102, 103).

June 4, 1938: Petitioner filed notice of motion and motion to vacate the order of May 5, 1938, granting the motion of the Board for leave to

withdraw its petition for enforcement (R. 55, 56).

June 6, 1938: Board filed opposition to petitioner's motion of June 4 (R. 56).

Petitioner filed notice of motion and motion for leave to amend petition for review (R. 105, 106).

June 10, 1938: Court denied petitioner's motion of June 4 to vacate the court's order of May 5, but stayed for 30 days the withdrawal of the Board's petition for enforcement pending the application for a writ of certiorari (R. 58).

June 10, 1938: Order entered by the court (R. 108):

a. denying petitioner's motion of May 19, 1938, for leave to amend its petition for review;

b. denying petitioner's motion of June 6, 1938, for leave to amend its petition for review;

c. denying the Board's motion of June 2, 1938, to vacate the order of May 9, 1938, directing that the transcript filed in the Board's case should be treated as filed in the petitioner's case, granting the Board's motion of June 2, 1938, to remand the petitioner's case to the National Labor Relations Board for the purpose of setting aside the Board's finding and order. This order is stayed for 30 days pending application for certiorari.

July 7, 1938: Petition for certiorari filed by petitioner to review the orders of May 5, 1938, and June 10, 1938.

October 10, 1938: Certiorari granted in each case.

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SUPREME COURT OF THE UNITED STATES.

Nos. 182, 183.—October Term, 1938.

Ford Motor Company, Petitioner,
182 *vs.*
National Labor Relations Board.

Ford Motor Company, Petitioner,
183 *vs.*
National Labor Relations Board.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 3, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the propriety of the action of the Circuit Court of Appeals in remanding a cause to the National Labor Relations Board for the purpose of setting aside its findings and order, and issuing proposed findings, and making its decision and order upon reconsideration.

The National Labor Relations Board, on December 22, 1937, entered an order against petitioner directing it to desist from described practices and to offer reinstatement, with back pay, to certain discharged employees.

On January 7, 1938, the Board filed its petition in No. 182 (called the Board's proceeding) in the Circuit Court of Appeals, seeking the enforcement of its order, and at the same time filed the transcript of the record.

On April 4, 1938, petitioner asked leave to adduce additional evidence. On April 11, 1938, petitioner filed its answer to the Board's petition, alleging that the order was invalid and asking that it be set aside upon the grounds, among others, that the Board had failed to accord petitioner a full and fair hearing, and that the Board had not itself considered the evidence but had adopted as its own a decision prepared by its subordinates without affording petitioner any opportunity to be heard thereon. It was also alleged that the findings were not supported by the evidence. Petitioner moved for a commission to take the depositions of witnesses, and served interrogatories upon the Board.

On May 2, 1938, after our decision in *Morgan* v. *United States* (April 25, 1938), 304 U. S. 1, the Board filed a motion for leave

to withdraw its petition for enforcement and the transcript of record, without prejudice. The Board stated that, should its motion be granted, it would set aside its order, would issue proposed findings with permission to the parties to file exceptions and present argument, and thereafter make its decision and order. On May 5, 1938, the court granted the Board's motion. On May 6, 1938, the Board served notice on petitioner of its intention to vacate its findings and order of December 22, 1937, but later in view of petitioner's objection held that action under advisement. On May 9, 1938, the order of May 5th was amended so far as it permitted the withdrawal of the transcript of record and the court directed that the transcript remain on file. On June 2, 1938, the Board purported to withdraw its petition for enforcement. On June 4, 1938, the petitioner moved to vacate the order of May 5th. That motion was denied on June 10, 1938, with a stay of the withdrawal of the Board's petition pending application here for writ of certiorari.

Meanwhile, on May 4, 1938, the petitioner filed with the Circuit Court of Appeals in No. 183 (called the petitioner's proceeding) its petition asking the court to review and set aside the Board's order of December 22, 1937. On May 9, 1938, the court directed that the transcript of record filed in the Board's proceeding should be deemed to have been filed in the petitioner's proceeding to review as of the date of May 4th. On June 2, 1938, the Board filed a motion to vacate that order of May 9th. At the same time the Board moved that in the event of a denial of that motion the case should be remanded to the Board for further proceedings.

On June 10, 1938, the court entered its order denying certain motions of the petitioner for leave to amend its petition for review, denying the Board's motion to vacate the order of May 9th, and granting the Board's motion of June 2d—

"to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case".

[1] Because of the importance of the questions presented in relation to the scope of the court's jurisdiction and its appropriate exercise, certiorari was granted to review the order of May 5th, granting the Board's motion to withdraw its petition for enforcement, and the order of June 10th, remanding the cause as above stated. October 10, 1938.

First. The authority conferred upon the Board by Section 10(d)[1] of the National Labor Relations Board, to modify or set aside its findings and order, ended with the filing in court of the transcript of record. Upon the filing of the transcript in connection with the Board's petition for enforcement, and notice, the Circuit Court of Appeals had jurisdiction of the proceeding as provided in Section 10(e) of the Act, as follows:

"Upon such filing [of the transcript], the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . .".

Under Section 10(f) the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement.[2]

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[1] Section 10(d) provides:

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it".

[2] Section 10(f) provides:

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . by filing in such court a written petition praying that the order of the Board

While Section 10(f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. Where the Board has petitioned for enforcement under Section 10(e) and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court. The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate. Here, petitioner in the Board's proceeding had sought affirmative relief and had taken steps to establish that right. Considering the scope and purpose of the jurisdiction of the court in a proceeding under Section 10(e), and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case.[3]

While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned. Petitioner's answer in the Board's proceeding presented substantially the same objections as those raised in petitioner's proceeding for review. The present contentions of the parties are largely addressed to procedural distinctions, but if we follow the course of

be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive".

[3] See Cooper *v.* Lewis, 2 Phillips, Ch. 177, 181; Bank *v.* Rose, 1 Rich Eq., 292, 294; Stevens *v.* The Railroads, 4 Fed. 97, 105; Chicago & Alton R. R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702, 713-715; City of Detroit *v.* Detroit City Rwy. Co., 55 Fed. 569, 572, 573; Pullman Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 146; Ex parte Skinner & Eddy Corporation, 265 U. S. 86, 93, 94; United Motor Service *v.* Tropic Aire, 57 F. (2d) 479, 481, 482; Jones *v.* Securities Commission, 298 U. S. 1, 19, 20.

the two proceedings we find that there is really but one ultimate question and that is with respect to the court's final action in remanding the cause to the Board for further proceedings.

Before the court on May 5th granted the Board's motion to withdraw its petition, the other proceeding had been instituted by the filing of the petition for review on May 4th. That proceeding was taken by petitioner as a person aggrieved by the order of December 22, 1937, and was doubtless prompted by the Board's motion to withdraw its own petition. As the transcript of the record of the administrative proceeding had already been certified and filed, it was within the court's control. The order of May 5th was amended on May 9th so as to preclude the withdrawal of the transcript, and on the same day the court ordered that the transcript be deemed to be filed in the petitioner's proceeding as of May 4th. We see no reason to doubt the power of the court to retain the transcript or to amend its order of May 5th accordingly, and certiorari has not been sought by the Board in relation to the order of May 9th. Our decision *In re Matter of the National Labor Relations Board*, 304 U. S. 486, is not apposite. There the transcript had not been filed, the court had not acquired jurisdiction of the subject matter, and the Board still had the authority conferred upon it by Section 10(d). In the circumstances of the present case we think it is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding "and of the question determined therein", and thus of the power of "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board". Sec. 10(f.) As on the Board's petition the court could grant affirmative relief to the person against whom the Board's order was directed, so on the court's entertaining the petition of that person for review the Board could seek not merely to have the petition denied but to have its order enforced, regardless of any separate proceeding to that end.

It thus appears that neither the order of May 5th, granting the Board permission to withdraw its petition, nor the attempt of the Board on May 6th to reassume control of the administrative proceeding, nor the Board's withdrawal of its petition on June 2d, accomplished anything of substance, as the Board, in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order. And any question as to the propriety of the court's order of May 5th became one of merely academic interest after the court by its order of June 10th re-

manded the cause to the Board. We turn to the consideration of that order.

Second. The cause was remanded to the Board for the purpose "of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case". The Board in its application for the remand stated that it would take that course. The specified purpose qualified the court's order. It created a condition which the Board was bound to observe. If the Board within a reasonable time failed to set aside its findings and order, we have no doubt that the court could vacate its order of remand and proceed with its consideration of the petition to review. The propriety of the order of remand must be considered in that aspect.

Third. If the court itself had set aside the findings and order of the Board upon the ground, as asserted by petitioner, that the Board had not considered the evidence and made its own findings, but had adopted as its own a decision proposed by its subordinates without affording petitioner any opportunity to be heard thereon, the court could have remanded the cause for further proceedings in conformity with its opinion. That ground being sufficient for setting aside the order, there is no principle of procedure in relation to the review either of judicial decrees or administrative orders which would require the court to examine other grounds of attack.

It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied.[4] Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points.[5] So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½) it is our practice to set aside the decree and remand the cause for further proceedings.[6] The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial

[4] Estho *v.* Lear, 7 Pet. 130; Levy *v.* Arredondo, 12 Pet. 218; Villa *v.* Van Schaick, 299 U. S. 152, 155, 156.

[5] Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, 176 U. S. 167, 179, 180; United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 424; Lincoln Gas & Electric Light Co. *v.* Lincoln, 223 U. S. 349, 361-365.

[6] Railroad Commission *v.* Maxcy, 281 U. S. 82; Interstate Circuit, Inc. *v.* United States, 304 U. S. 55.

action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 583; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 297; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47, 48, 49; *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, 42.[1] Similar action has been taken under the National Labor Relations Act in *Aguilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 155. See, also, *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509, 515. The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 262, 278.

Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. *Federal Trade Commission* v. *Curtis Publishing Co., supra; International Shoe Co.* v. *Federal Trade Commission, supra.* If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. *Federal Trade Commission* v. *Royal Milling Co., supra; Procter & Gamble Company* v. *Federal Trade Commission, supra; Ohio Leather Company* v. *Federal Trade Commission, supra; Aguilines, Inc.* v. *National Labor Relations Board, supra.* Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements.

Fourth. The present controversy thus comes to the narrow point that instead of setting aside the Board's findings and order, the

[1] Compare Texas & Pacific Rwy. Co. *v.* Interstate Commerce Commission, 162 U. S. 192, 238, 239; Southern Railway Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 302; Florida *v.* United States, 292 U. S. 1, 9; Brotherhood of Railroad Trainmen *v.* National Mediation Board, 88 F. (2d) 757, 761.

court has allowed the Board itself to set them aside. The contention on that ground is without substance. In either event the findings and order are vacated. Petitioner's objection to the order because of lack of due hearing results in the abandonment of the findings and order and petitioner will thus be completely freed from any determination they contain or any obligation they impose.

Petitioner says that the Board has not confessed error. This is immaterial if the assailed findings and order are set aside. Nor is it important that the court has not held the findings and order to be void. It is elementary that the court is not bound to determine questions which have become academic.

There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid. The application for remand in this instance was not on frivolous grounds or for any purpose that might be considered dilatory or vexatious. Petitioner had raised a serious question as to the validity of the findings and order. The Board properly recognized the gravity of the contention and sought to meet it by voluntarily doing what the court could have compelled. That was in the interest of a prompt disposition, and whatever delay has resulted is due to petitioner's resistance to that course.

Petitioner insists that it had other objections to the Board's conduct of the proceeding. But it was not necessary for the court to consider them, as the setting aside of the findings and order carried with it the opportunity for reconsideration and the making of a new record. What findings or order would thus be made became a matter of conjecture and in any event these and the manner of arriving at them would be subject to any justified criticism.

As the substantial question is presented by the order of June 10th, the writ of certiorari in No. 182 is dismissed. The order of June 10th in No. 183 is affirmed.

It is so ordered.

Mr. Justice ROBERTS did not hear the argument and took no part in the consideration and decision of this case.